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# **The Form and Content of Public Law: From Political Theology to Political Economy**

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A thesis submitted to the Department of Law of Birkbeck, University of London for the degree of Doctor of Philosophy, London, January 2017

## **DECLARATION**

I certify that the thesis I have presented for examination for the PhD degree of the Birkbeck, University of London is solely my own work.

## ABSTRACT

This thesis is a contribution to the critique of constitutional theory. It contributes to this critique from a Marxist standpoint, by constructing a theoretical argument while drawing from and applying this on concrete historical cases. More specifically, it examines the public legal form and the change in the form of exercise of public power as corresponding to the level of intensification of social and economic contradictions. Under this prism, public legal concepts are analysed in their unity as a systematic whole, in their historical development, as well as in their social function. The case-reference for this theoretical argument is the interaction of constitutional and socio-economic processes in post-2008 crisis Greece. The observation of the exceptional form of the Memoranda of Understanding and its impact on the Greek legal order made necessary a sustained analysis of the public legal form and the changes it sustains during periods of intensified political and socio-economic contradictions.

The major contribution of the thesis consists in the move from Political Theology to Political Economy, and the identification of a need to look into historical cases and socio-economic processes so as to make sense of developments in public law and the role and function of public law concepts and processes in a social formation. Consequently, the thesis combines an internal element, which focuses on the internal unity of public law concepts in their historical origin, and an external element, which looks at their mutual inter-development with socio-economic and political processes.

It begins by examining fundamental public legal concepts (such as popular sovereignty, social contract, general will) and dualisms (such as objective and subjective law, norm and decision, constituent and constituted power) as forming a unified whole, in their historical origin and social function. These concepts are discussed as fictions, but are not dismissed as mere illusions; they are rather examined as fictions with concrete functions in the social formation, as evidenced in the analysis of the concrete case of the 2015 Greek referendum and the role played by concepts such as general will and popular sovereignty in its process. Finally, the analysis of the form of public law turns to the examination of the change in the form of exercise of public power in concrete situations of crisis. In this context, the concepts of exception, emergency, and necessity are discussed before moving to concrete historical cases. The intensified contradictions in mid-war Germany, the change from the Weimar to the Nazi state form, and the effect of these developments on Carl Schmitt's theoretical framework are examined as a necessary complement to the analysis of constitutional processes at work in the current predicament. As far as the latter is concerned, the Greek crisis legislation is analysed as a unity of form and content. It is argued that the exceptional form of exercise of public power, manifested in the Memoranda of Understanding, has to be seen as accompanying a necessary content, i.e. prescribed economic and monetary policies found in European Union legal and political documents which corresponding to specific politico-economic views. The focus on labour reforms, as the socio-economic content of the Greek crisis legislation, combined with a comparative analysis of such reforms in countries without Memoranda, reveals the general and class oriented nature of the measures, which is explained through the Marxist concepts of capitalist uneven development and competition.

The move from Political Theology to Political Economy is concluded with a note on the relation between the concepts of democracy and dictatorship, a dualism which underlies the whole thesis and points towards the necessary connection between questions of sovereignty and questions of actual power.

## ACKNOWLEDGMENTS

One of the epistemological premises of this thesis is that knowledge is a collective process of labour. This intellectual product is a result of such a collective process and the influences on and inspirations for it cannot be easily enumerated. However, there are a few people whose help and support has been vital in the process of completing this research project.

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## Introduction

This is a work of public law. In particular it is an analysis of the public legal form and its relation to crisis, political, social and economic. The stimulus for this theoretical analysis of the dualistic form of public law and its fundamental concepts was given by a close observation of the constitutional processes accommodating the introduction of the Greek crisis legislation and the implementation of the measures agreed upon by the Greek government and its creditors in three Memoranda of Understanding, in order to deal with the economic crisis. Initiated and carried out in a context of economic, social and political change, this thesis could not but examine the change in the legal form of exercise of public power in its relation to social and historical change.

In this context, as the analysis unfolds (and in fact as this research project was developing), socio-economic and, in particular, labour relations emerge as a central theme. The idea of labour emerges not in the abstract, but as embedded in a system of contradictory social relations. With 60% youth unemployment it is considered a miracle for a young man or woman in Athens to have a job. And when he or she is finally blessed with the opportunity to earn his living, he acquiesces to the hardest conditions. Working double shifts in jobs where he or she is used as an expendable tool has turned out to be the greatest blessing in nowadays Greece. Do we not witness here a beautiful dialectical reversal of Exodus 5:4-19? The labourer does not anymore wish to be liberated from the bondage of slavery; he rather wishes to be bound as a slave, to work for 'an illusion of a wage' in order to escape the passivity and pessimism of unemployment. What is more, the prospect of him fighting collectively for his rights is pre-empted by the measures against collective bargaining put in place with the Second Memorandum.

The right to collective bargaining is safeguarded in the Constitution of the Hellenic Republic. However, the ease with which the Greek Council of State found the measures which inhibit the exercise of this right constitutional, for reasons of necessity and general interest, made all the more necessary the examination of these concepts (of necessity and general interest) and their role in a social totality. Furthermore, these arguably unconstitutional measures were ratified by the Hellenic Parliament through the exceptional procedure provided by its Standing Order. Therefore, this thesis seeks to examine these concepts of necessity and exception in their internal unity with other central concepts (such as popular sovereignty and general will) and dualisms (such as norm and exception) of public law, so as to shed light on the role of these constitutional mechanisms and their correspondence to the process of social, political and economic change.



Despite this being a work of public law, as the analysis unfolds, the fundamental antithesis in capitalist societies, the antithesis between Capital and Labour, enters the scene. It enters the scene not as a Manichean dualism presenting Labour as the absolute Good and Capital as the absolute Bad; but as a dialectical dualism, with capital developing the productivity of labour and developing the forces of production up to a certain point, at which capital itself hinders this development, because the relation itself is structured on the basis of market imperatives and the criterion of profit. At this point, economic growth translates into depreciation of labour, reduction of unemployment into intensification of exploitation. Such is the socio-economic context in which the constitutional concepts and processes develop and are examined.

This work is an analysis of the dialectical processes at work in the field of public law, accommodating the socio-economic processes of this stage of capitalism. This means that in the development of this research project it became necessary to look into other cases of social, political and economic change. This necessity was met with the comparative analysis of the measures introduced in the Greek legal system together with measures introduced in other legal orders of Member States of the European Union. Of course, Greece was not the only country where the effects of the crisis were met with the legal institution of Memorandum of Understanding. However, rather than conducting a comparative analysis of measures introduced in different countries where Memoranda have been imposed, the Greek labour law reforms are juxtaposed to reforms introduced in countries without Memoranda, in order to show that the general functioning of public law concepts in accommodating the introduction of these reforms is not contingent upon the existence of the institution of the Memorandum.

Furthermore, a look into other historical cases of intensified contradictions was found necessary for the thorough examination of the process of change in the form of exercise of public power due to economic, social and political crisis. On this basis one part of the research was dedicated to the analysis of transition from the Weimar Republic to the Nazi state form. The choice of mid-war Germany, as a case-study for the examination of the response of constitutional processes to crisis, was not arbitrary. In fact, the socio-economic and political crisis of the '30s was the context for the development of Schmitt's theory of the exception and the debate between Schmitt and Kelsen on the nature of modern public law. A look into the intensified contradictions in mid-war Germany allows an examination of the relation between shifts and developments in constitutional theory and social, political and economic turmoil.

It follows from the above that legal concepts, such as 'exception' and 'necessity', are examined in the thesis together with socio-political concepts, such as 'class struggle' and 'capitalist uneven development'. In order to grasp the meaning and role of 'necessity' and 'exception' certain

theoretical steps must first be taken, so as to allow the opening of the juridical to the socio-political. For instance, in the last chapter the concept of ‘intensification of socio-economic contradictions’ (which includes both the concept of class struggle and intra-capitalist competition) is used to explain the concept of ‘best practices’ which is found in the Third Greek Memorandum. Similarly, this concept is employed to analyse the shifts and continuities in Schmitt’s theoretical apparatus during the change in the form of exercise of public power in mid-war Germany, from the Weimar Republic to the Nazi state form.

### Contribution to literature

A major point for understanding the theoretical angle of the thesis may be raised here. This research project was carried out on the basis of the identification of a general need for a Marxist analysis of public law. Every difficulty encountered in this process strengthened this conviction. The need for a many-sided analysis of constitutional processes in their interrelation with social and economic ones pointed to the Marxist dialectics and the concepts of ‘totality’, ‘class struggle’ and ‘socio-economic contradictions’ as the appropriate concepts to structure this analytical process. Therefore, the thesis attempts a return to Marxist theory and its application to new questions (such as the crisis legislation and the introduction of major labour law reforms through various constitutional processes in the context of the Eurozone crisis), as well as its application to revisit the debate on the role of the Schmittian theoretical apparatus. This is, perhaps, the main contribution of the thesis to existing literature: a contribution to the Marxist analysis of public law. In recent years there has been a reigniting of the Marxist approach to law, with specific focus on the field of international law<sup>1</sup>. This thesis aspires to pave the way for the development of a Marxist approach to public law. For, despite the existence of various analyses of the Marxist theory of the state, there has not been so far a systematic Marxist analysis of the main concepts of public law.

References are made throughout the thesis to the analyses of Marx, Lenin, Lukacs, Althusser, Marcuse, Poulantzas, Negri, on the role of the state and law in a social formation. What the thesis offers to existing Marxist literature, as well as to existing literature of constitutional theory, is a systematic analysis of the internal unity of public law concepts and their objective role in the totality of a social formation. This is done on the basis of Poulantzas’s bidirectional analysis, as outlined in the first chapter on the methodological angle of the thesis. This bidirectional analysis

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<sup>1</sup> Indicatively, see (Miéville, 2006), (Knox, 2014), (Bowring, 2009).

includes an internal aspect, where public law concepts and principles are examined in their historical specificity and relation to each other, as well as an external aspect, where these concepts are analysed in their relation to changes in the social and sphere.

The first chapter outlines the theoretical and methodological basis and structures the rest of the thesis. The dialectics as a mode of conceiving reality in its many sided and contradictory movement is central to this analysis. Main concepts of the Marxist dialectics, such as ‘class struggle’, ‘relative autonomy’, ‘form and content’, are discussed therein in order to make sense of the concept of ‘totality’, which is crucial for the many-sided examination of public law. In that manner, the process of this research could be seen as a development from the concrete case of problematizing the Greek crisis legislation, to the more abstract level of constitutional theory and Marxist theory, in order to return to the concrete case with the enriched totality of concepts in their interconnection, so as to make sense of the juridico-political and the socio-economic processes in their interconnection.

In this process, the relative autonomy of law necessitates the analysis of the concepts of popular sovereignty, general will, and constituent power, as fictions which comprise the public legal form which accompanies social and historical movement. It is argued that the main concepts of public law are structured around the *fiction juris* of a unified people, which is itself the result of a historical process of development. The ultimate goal of the analysis is to examine how principles of public law (such as ‘general will’, ‘popular sovereignty’, ‘general interest’, ‘necessity’ etc.) objectively function to fulfil a social purpose, and how they change and relate to each other, thus giving rise to different forms of exercise of public power based on the level of intensification of socio-economic contradictions.

Therein consists another contribution of the thesis to the existing literature of constitutional theory. In chapters two and three the totality of public law concepts and dualisms are analysed in their internal unity, historical specificity and development. It is argued that the concepts of ‘general will’ and ‘popular sovereignty’ are not mere fictions, but concepts with specific role in a social formation. Their objective function consists in contributing to the legitimate exercise of public power. These concepts are essential elements of a totality of concepts of public law which objectively function to reproduce the regime of power, property, and productive relations of capitalism at all costs.

The analysis of the internal unity of public legal concepts and dualisms is followed by an examination of concrete cases in the last two chapters. In fact, the fourth chapter is a contribution to the vast bibliography existing and assessing the work of Carl Schmitt and the change from the

Weimar Republic to the Nazi state form. The thesis contributes to this debate in two ways: First, by revealing the precariousness of the welfare state form and its contingency upon the intensification of capitalist contradictions, which it reproduces. Second, by looking for continuity in Schmitt's thought, and approaching this work in its totality, not dismissing the Nazi era writings as an aberration. The shifts and continuity in Schmitt's work are examined alongside the shifts in the form of exercise of public power in mid-war Germany, which accompanied the intensification of the social and economic contradictions taking place at the same period. Parallel to this, a Marxist point is put forward with regards to the relation between norm and exception. The concept of necessity is discussed here in detail. Necessity is referred to not only as a normative concept, but as a concept opening the juridical and the political to the social and economic.

The discussion of the concept of necessity and the examination of the shifts and continuity in Schmitt's theoretical apparatus are part of the thesis's contribution to a move from political theology to political economy. This theoretical argument is also applied with regards to the Greek crisis legislation. Necessity is one of the legal terms employed by the Greek Council of State to review the constitutionality of the Memorandum of Understanding. However, necessity acquires an additional meaning in the context of a Marxist analysis, as an analytical concept which refers to social and economic processes (social needs and interests) while revealing the totality in methodologically approaching constitutional forms and processes.

As a result, the contribution of the thesis to the analysis of the Greek crisis legislation consists in emphasising the need for a many-sided approach to the legal process. The legal measures introduced with the three Memoranda in Greece are assessed together with their basis on European Union rules and principles. Furthermore, these measures are examined in a comparative analysis to measures introduced in other EU Member States without Memoranda. As the contradictions shaping and being shaped by the Greek crisis legislation are not internal to Greek society, the public legal form is examined at both national and supranational level. The socio-economic concepts of 'economic crisis', 'uneven development', 'capitalist competition', and 'intensification of exploitation' are discussed in an argument which reveals EU law as a coherent set of policies, principles, and rules which reflect specific class-oriented policies and solutions to the crisis. Ultimately, the measures, as well as the constitutional processes with which they are introduced in the various legal orders, are seen as both necessary, in terms of complying with prescribed EU principles and policies, and contingent upon the intensification of social and economic contradictions.

## Structure

On the basis of the above, there are two main theoretical hypotheses which are examined. First, that public law assumes a specific form, which is evidenced in a series of conceptual pairs, because of its specific function in the totality of the social formation. The second hypothesis advanced is that the change in the form of exercise of public power, i.e. the change in the state form, corresponds to different levels of intensification of socio-economic contradictions. In examining these two hypotheses, the thesis is structured as follows.

The purpose of chapter one is to set the theoretical and methodological tone for the dialectical analysis of the public legal form. If the thesis aims at the application of Marxist dialectics to the analysis of public law, it is essential to clarify where exactly it is positioned in the vast field of Marxist theory. This will be done through the discussion of a unity of concepts (such as ‘reproduction of the relations of production’, ‘class struggle’, and ‘relative autonomy’) and dualisms (‘abstract and concrete’, ‘form and content’) as they appear in Marx’s own work, but also in the work of Marxist scholars, such as György Lukács, Louis Althusser, and Nicos Poulantzas. Of course the aim of this chapter is not to celebrate the unconditional authority of these concepts, but to emphasize the usefulness of these concepts -if seen in their unity- in examining the relation between legal processes and socio-economic ones.

The chapter begins with what initially may seem as an arbitrary definition of the dialectics, as a mode of conceiving reality in its many-sided and contradictory movement. The dialectical examination of an object of study essentially means its many-sided analysis in both its (natural, historical or social) development and its essential connections with other processes. The concept of totality is crucial in this context, as it stands for the many-sidedness, as opposed to one-sidedness and fragmentation. For a many-sided analysis of law -and specifically of the public legal form in our thesis- legal processes have to be examined in their unity with social and economic processes. The aforementioned dialectical concepts are crucial for this; but the dialectics necessitates that these concepts too are examined and employed in their unity with each other. The concept of ‘reproduction of productive relations’ cannot make sense without the concept of ‘class struggle’, and they both remain one-sided unless combined with the concept of ‘relative autonomy’. The impossibility of the dialectics, as a continuous process of transition from one definition into the other, is here seen not as an obstacle, but as a demand for thoroughness and constant furthering and updating of the processes here examined.

Chapter One is followed by the substantive analysis of the public legal form, which comprises of two interrelated parts. Chapters Two and Three combine for an analysis of the internal unity of concepts and dualisms of public law in their historical specificity and development. Chapter Four, on the other hand, comprising of three distinct sections, examines the change in the form of exercise of public power and how public law concepts relate to each other to accommodate such changes due to the intensified social, economic and political contradictions.

The dialectical analysis necessitates the examination of the relatively autonomous nature of concepts in their historical genesis and their relation to socio-economic development. Chapter Two initiates this substantive analysis of shifts and continuity by looking at the politico-theological concept of the 'King's Two Bodies', which developed in the transitional period from feudalism to capitalism and which captures the legal form in its embryonic stage, indistinguishable from the religious form. The analysis of this doctrine, which lies at the origin of constitutionalism and the modern notion of democracy, enables a critical examination of the 'oneness' necessary to conceal social divisions for the legitimate exercise of public power. This oneness is inherent in the concept of popular sovereignty as it is based on the fiction of the unified people. In this context, the social contract as the theoretical mechanism which forms the basis of modern political theory is discussed, with emphasis on its socio-economic origins.

The aim of this chapter is not to dismiss these fictitious concepts as mere illusions, but, on the contrary, to show their objective function in reproducing a regime of power, property and productive relations. Towards this end, the dualistic form of public law will be analysed as based on the concepts of the legal subject and the objective legal order. The focus of the analysis in examining these dualisms shifts to the 20<sup>th</sup> century debate between Hans Kelsen and Carl Schmitt on the role of the 'law's outside' in order to show the equivocation between the *prima facie* antithetical conceptions of the two thinkers. This part sets the scene for the examination of the relation between normal and exceptional forms in Chapter Four.

The analysis of the internal unity of public law concepts is furthered in Chapter Three, with the concepts of 'general will' and 'constituent power' –as well as their counterparts, i.e. individual will and constituted power. The politico-theological elements inherent in both these concepts are examined, namely the infallibility and free nature of the general will, and the inexhaustibility of constituent power. With regards to the former, the argument is structured around the questioning of the possibility of existence of a general will in a class-divided society, so as to stress its fictitious character and role in the functioning of a regime of power, property, and productive relations. This is done both through an analysis of the historical specificity of the concept, but also through extending the analysis to the issues of public opinion and State Ideology.

Additionally, the bidirectional analysis of the form of public law allows the discussion of a concrete case of expression of the general will: the case of the referendum of July 2015 which was held in Greece. The discussion of this concrete case helps illustrate the theoretical argument, but it also provides a link to the final chapter and the analysis of the Greek crisis legislation. The holding of the 2015 referendum was a central aspect of the constitutional processes which accompanied the latter. Furthermore, the dualism of constituent and constituted power is discussed, as it occupies a central place in more recent constitutional debates. This debate signifies an attempt to move beyond the mythical ‘oneness’ of sovereignty. It is argued that this attempt is in risk of remaining one-sided, unless the move from political theology to political economy is concluded. The discussion of the debate is followed by a critical examination of Antonio Negri’s elaboration on the concept of constituent power, which is done through the categories of ‘the abstract and the concrete’. Ultimately, it is argued that Negri’s conception of constituent power remains one-sided and, as a result, fails to conceptualise the relation between constitutional form and socio-economic development.

Chapter Four initiates the examination of the change in the form of exercise of public power in relation to the intensification of socio-economic contradictions. This task is intertwined with the analysis of the relation between the two main forms of exercise of public power, i.e. norm and exception. In fact, the chapter’s first section discusses the relation between norm and exception in an argument which introduces a different reading of the concept of necessity. Necessity is employed not only as a normative concept, but as an analytic one, enabling the move from political theology to political economy. Ultimately, it is argued that both forms are underlined by the same necessity of reproducing a regime of power, property, and productive relations.

This argument is further pursued in Chapters Four and Five with reference to concrete cases, namely the case of mid-war Germany and the case of post-2010, crisis-ridden Greece. Both chapters discuss the shifts and continuities in constitutional processes in the aftermath of major economic and socio-political crises, which led to the intensification of both class and intra-class contradictions. Chapter Four focuses on the transition from the Weimar Republic to the Nazi state form and how this transition was reflected in Carl Schmitt’s theoretical apparatus. The change from the Weimar to the Nazi state form is explained through a Marxist analysis based on the concepts of reproduction of relations of production, and intensification of exploitation through the extraction of absolute surplus value.

The Weimar form -a welfare, corporate but also contradictory form-, which improved substantially the lives of the toiling classes, had to change into the Nazi form, which could better accommodate the contradictions which the former had helped reproduce. The rising need to

intensify the exploitation of labouring classes so as to restore the profitability of large capital, meant that the hard won social rights had to be done away with. These shifts and contradictions are reflected in the works of various thinkers, such as Hugo Sinzheimer, Ernst Fraenkel, Franz Neumann and Carl Schmitt.

It is argued that both the change in the form of exercise of public power and the shifts in Schmitt's theoretical apparatus can make sense only if they are seen as necessary for accommodating an intensified level of social contradictions. To this end the specific processes which necessitated the conditions of intensified exploitation are discussed, so as to shed light on Schmitt's constant demand for efficiency in making the political decision and crushing the political enemy, as well as in dealing with any centrifugal tendencies. Additionally, Schmitt's plebiscitary legitimacy and his principle of leadership, which appears after 1933, are seen in their unity and as reflecting specific social needs, which appeared not only in the field of constitutional law but also in Nazi labour institutions, such as the German Labour Front.

The discussion of the precariousness of welfare form in the face of the need to intensify exploitation is continued in Chapter Five, which analyses the form and content of the Greek crisis legislation, i.e. the form and content of the Memorandum of Understanding. The concrete measures introduced with the three Greek Memoranda -with specific emphasis on the labour law reforms- are discussed together with the constitutional processes with which they are introduced. It is argued that both form and content are, on the one hand, necessary, because they reflect long-standing demands of enhancing the competitiveness of capitalist states and enterprises as reflected in EU legal and political documents, and, on the other hand, contingent upon the development and intensification of socio-economic contradictions.

To this end, European Union law is seen as an integral whole and a principled system, which forms the basis of these measures. EU legal and political documents (such as the European Fiscal Compact and an opinion of the Advocate General of the Court of Justice of the EU) are analysed alongside the Greek Council of State's jurisprudence, so as to unearth the content of the concept of necessity to deal with the crisis. The investigation is led to the EU principles of growth and competitiveness, which are examined together with the Marxist concepts of capitalist unevenness and competition. This is followed by a class analysis of the inner connections and social function of these principles, on the basis of the uneven development of capitalist national economies and the competition between them.

The EU's capitalist structure and the intra-EU antagonisms are to account for the resort to the extraction of absolute surplus value through intensified exploitation. This need for intensified



exploitation is captured in the principle of ‘flexibility’, which stands for the deregulation of the labour market, and is introduced throughout the EU. This makes necessary a comparative analysis of the measures introduced in France and Italy in the aftermath of the Eurozone crisis. The chapter moves on to examine how the aforementioned socio-economic contradictions and conditions of intensified exploitation affect the public legal form, at both national and supranational level. The process of condensation of capitalist interests at the EU level is discussed, together with the institutional shifts in the aftermath of the crisis, in order to ultimately stress the contingency of the form of implementing these measures, as well as the necessary but not fixed nature of the measures themselves.

The thesis concludes with an elaboration on the underlying theme of democracy and its relation to the concept of dictatorship. On the basis of the dialectical analysis of public legal concepts, the democratic question can be posed again from a Marxist standpoint: democracy for whom? The analysis enables an understanding of the issue of democracy not only as form of exercise of public power, but as actual power and input of the popular strata over the organisation of a regime of power, property and productive relations.

## Chapter One: Methodology

### I. Dialectics against metaphysics

This thesis is a dialectical analysis of the form of public law. It begins from the observation that there is a dualistic form of public law. Examining the internal unity of the governing principles and concepts of public law the following hypotheses are advanced: First, public law assumes this dualistic form, which is evidenced in a series of conceptual pairs, because of its specific function in the totality of the social formation. Further to this, the change in the form of exercise of public power, i.e. the change in the state form, corresponds to different levels of intensification of socio-economic contradictions. Evidently, the dualistic form of public law and the development of this form will be the object of this analysis. The aim of the analysis is to contribute to the critique of constitutional theory by challenging the foundational concepts of liberal constitutionalism with a view to revealing their function in reproducing a regime of power, property and productive relations.

The method of examining this hypothesis is the dialectical method. This term is used in full awareness of the bibliography<sup>2</sup> -to which we concur- that the dialectics cannot be characterised as merely a method; it is rather a mode of conceiving reality in its many-sided and contradictory movement. Dialectical analysis, as it is here employed, consists of mainly three elements. The first is many-sidedness. Dialectical analysis is concerned with the interconnectedness of processes. A dialectical analysis of the legal form, therefore, takes into account the intricate relations between legal, political and socio-economic processes, as opposed to the isolated and fragmented way of examination of legal phenomena by positivist theory. The second element is movement. A dialectical analysis is an analysis of processes. Juridico-political phenomena are seen in their development. For instance, examining the Reichstag Fire Decree of 1933, at the origins of the Nazi state form, requires the examination of a fifteen-year process of developing contradictions that necessitated a change in the form of exercise of public power. Additionally, social, political and juridical processes are seen as historical processes. Capitalism, law, the state are not eternal; they are, rather, historical phenomena. So, the examination of the legal form has to take into account the historical movement; how legal form has developed historically with regards to socio-economic development.

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<sup>2</sup> See for instance Fredric Jameson's warning against viewing the dialectics as a method, because such conception 'necessarily carries within itself a radical opposition between means and ends. If the dialectic is nothing but a means, what can be its ends? If it is a metaphysical system, what possible interest can it claim after the end of metaphysics?' (Jameson, 2009).

Last but not least, this movement is contradictory movement. The historical movement of juridico-political and socio-economic processes examined develops on the basis of antagonistic contradictions and struggle of the opposites. Socio-economic and juridico-political contradiction as a category helps in the analysis of different processes. Contradiction appears in economic forms (in the form of contradiction between use-value and exchange-value, between abstract labour and concrete labour, or between necessary labour and surplus labour); it may appear in social forms (in the contradiction between the socialised labour process and the private ownership of the means of production, or in the class struggle as motor of history). In the analysis of public legal form, the category of contradiction is useful in order to explain the specific function of public law concepts in reproducing the contradictory relations of capitalism. The public legal form, as will be shown in the following chapters, abstracts from the contradictory content of class-divided society and reproduces this regime by sustaining the fiction of ‘oneness’ of a unified people. What is more, the public legal form corresponds to level of intensification of socio-economic contradictions.

The dialectics helps us grasp the totality of changes in a social formation; the changes in the legal and political forms are assessed in their mutual unity with social and economic change. In fact, the form of public law will be assessed in its interrelation with the socio-economic conditions in their historical development. Therefore, the main characteristic of the dialectical analysis is found in the concept of the totality. The concept of totality captures the proclaimed move of the thesis from political theology to political economy. It captures the above elements of many-sidedness, movement and contradiction, together with the methodological requirement of bi-directionality in the analysis of the legal form, which is discussed in the next section.

Totality is identified with many-sided analysis. Here we must differentiate between materialist many-sidedness and idealist many-sidedness. An example of the latter can be found in Hegel’s ‘Philosophy of Right’, which is a many-sided analysis of the juridico-political phenomenon, albeit one which begins with the notion of the legal subject as abstract will; moving to the notion of property as will externalised; then to the notion of contract as common will between two subjects; and finally towards the state which is the expression of the general will. On the contrary, the dialectical materialist analysis comes to challenge the foundation of Hegel’s idealist dialectics, by asking: Does the legal subject exist in the abstract? Or does its existence presuppose relations between other subjects and objects? Hegel’s many-sided analysis has to be turned on its head so as to reveal the content behind this formal unity of abstract elements.

Hegel himself points towards this resolution by revealing and emphasizing upon the contradictions of property and propertylessness in his analysis of Notrecht<sup>3</sup>. Hegel's analysis of Notrecht reveals that 'the Not (i.e. the 'necessity') that causes the Notrecht is a social issue'. Therefore, the analysis of law in general should examine it as a form of expression of social relations. The dialectics of form and content in the analysis of law helps us grasp property as a form of expression of relations to the means of production and the product (who owns the former and who appropriates the latter); contract as a form of expression of the exchange relations in the sphere of circulation which mask the exploitation in the production process; the legal subject as the formal subject of the sphere of circulation, the possessive individual entering into contract, abstracted from his determinate characteristics as worker or capitalist; and social contract as a form of legitimation of the objective legal order.

This move from the abstract to the concrete is captured in the concept of the totality to which Karl Marx refers in his Preface to 'A Contribution to the Critique of Political Economy': 'neither legal relations nor political forms could be comprehended whether by themselves or on the basis of a so-called general development of the human mind, but that on the contrary they originate in the material conditions of life, the *totality* of which Hegel, following the example of English and French thinkers of the eighteenth century, embraces within the term 'civil society'' (Marx, 1975). On this basis, public law, as the area of convergence of the juridical and political, will be examined in its relation to socio-economic conditions and their development.

It is pertinent here to briefly elaborate on this move from the abstract to the concrete, by looking at the content of these terms in dialectical logic. The method that Marx employs in the Capital is referred to as the ascension from the abstract to the concrete. The concepts of abstract and concrete in dialectical logic are distinct from the abstract and the concrete in formal logic. When we speak of the concrete we do not speak of the concrete thing that exists in objective reality -or at least not merely of this- and which is given to us in our senses. Similarly, when we speak of the abstract we do not speak of something that exists only in our minds, i.e. in the realm of thought (for instance abstract labour very well exists in objective reality in the form of value) (Ilyenkov, 2008).

The abstract and the concrete are rather *epistemological categories that help us grasp the process of conceiving reality in its movement and interconnection of phenomena*. The concrete here is

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<sup>3</sup> Notrecht refers to conflicts and concrete clashes brought on by the existing social relationships. Notrecht becomes the right of extreme need, that of those who risk starving to death. Not only do they have the right to steal the bread that will keep them alive, but the 'absolute right' to transgress the right of property, that legal norm which condemns theft (Losurdo, 2004, p. 87).

seen as a unity of diverse elements, while abstraction corresponds to one-sidedness, the initial point of an analysis. The abstract in the beginning of an analytical process is one side/aspect/part of the whole. In the end of this process the abstract becomes an expression of the concrete totality, because it has been analysed in its relation to other aspects of the totality. In that sense the dialectical analysis 'is a continuous process of transition from one definition into the other' (Lukacs, 1980, p. 3). Therefore, the dialectic demands the many-sided analysis of an object: an object must be examined in its development, its self-motion, its essential connections with other objects, and the appearance and resolution of its internal contradictions.

In order for this to happen, a dialectical analysis of law makes use of certain categories, such as the 'unity of form and content', the 'relative autonomy of law and state', the 'class struggle', and the 'reproduction of the relations of production'. Before we move on to examine these concepts let us clarify a bit further the use of the term dialectics by juxtaposing it to the concept of metaphysics. Above, we defined dialectics as a way of examining phenomena and concepts in their mutual interconnection, movement, and contradictory development. Metaphysics, on the other hand, is the way of conceiving reality, i.e. natural and social phenomena, outside their organic interconnection, as immutable in their essence, and without internal contradictions. The metaphysical conception of reality is characterised by the fragmentation and one-sidedness of its approach, as well as by the eternalisation of phenomena or structures.

This autonomisation and naturalisation of phenomena and structures by metaphysical thought is manifested in the idea of the 'primacy' or 'autonomy' of the 'political'. There has been a recent turn by critical thinkers to the theory of Carl Schmitt and his concept of the autonomy of the political in an attempt to appropriate those elements of his thought critical of the liberal state. This turn, however, does not escape a metaphysical conception of reality which elevates the political as the determinant model of human praxis. The Schmittian conception of the political elevates problems specific to politics (that is, problems specific to the organization of relations of production and their political mediation) to problems of ontology. In this manner this method of analysis leads to the obscuring of the intricate relation of legal and political phenomena to social and economic ones and of the role each of them plays in the totality of a social formation in its development.

To illustrate this point, it is crucial to refer to the fundamental issue of the concept of human, which forms the onto-theological background of Schmitt's idea of the political -as it is identified

with the ‘ever-present possibility of conflict’ - and juxtapose the dialectical ontology of labour<sup>4</sup> to this metaphysical ontology of conflict. Man’s essentially sinful nature after the Original Sin and the Fall forms the ontological basis on which both of Schmitt’s counter-revolutionary guides, i.e. Donoso Cortes and Joseph de Maistre, built their reactionary socio-political theories (Schmitt, 2005, p. 56). The ‘absolute sinfulness and depravity of the human nature’ make man a wolf against the other men, and the natural state of man is a state of war. This war never disappears as a possibility, even after the institution of the polity (either through the social contract, or through the imposition of the state). This is Schmitt’s fundamental position. The political appears as the ever-present possibility of conflict due to man’s corrupt nature.

Based on this conception, human nature is eternalised into a metaphysical image of sin and the social and historical nature of conflict and contradiction is eternalised due to this very nature. Thus, this metaphysical position acknowledges the objective existence of contradictions, but argues that these contradictions and antagonisms that appear in social processes are eternal. This is what we call ontology of conflict. It is merely a move away from the concealment of antagonisms to their perpetuation-qua-naturalisation<sup>5</sup>.

Against this metaphysical position, a dialectical analysis aims to reveal that there is no extra-historical/a-temporal/metaphysical schism, the form and expression of which is class struggle. And conflict is not founded in human nature as its basic ontological premise. Rather, social contradiction is a historical one, to be found in class societies in the process of historical development of different modes of production for the satisfaction of social needs. After all it was Marx himself, in his ‘On the Jewish Question’, who refuted such ‘autonomy of the political’ by demonstrating the impossibility of a merely ‘political’ emancipation when the situation is that of exploitation and inequality in the so-called ‘civil society’ -the sphere where ‘Man’ is not a ‘political’ being but one defined by painful need and the competition for resources.

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<sup>4</sup> Labour as a dialectical category plays a fundamental part in Hegel’s analysis of the process towards achieving self-consciousness. The process following the struggle to the death and the establishment of the positions of Master and Slave between two individual subjects is distinguished for its materiality and its capacity of revealing the transient nature of these social relations. It is through the process of labour that the state of Lord and Bondsman is negated (Hegel, 1977, pp. 118-119). In Marx’s dialectics, the importance of labour is furthered as it is linked with the concept of the totality of social relations. Man becomes separated from the animal world when he begins to work using implements of labour which he himself created. Thus, for the dialectical analysis, the real universal basis of everything that is human in man is production of instruments of production (Ilyenkov, 2008, p. 74). Production of labour implements is the objective basis for all other human traits without exception, as the simplest, elementary form of man’s human being (Ilyenkov, p.75). It is for this reason that Georg Lukacs in his ‘Ontology of Social Being’ analyses the concept of labour as model for social practice (Lukacs, 1980).

<sup>5</sup> Laclau and Mouffe’s agonistic theory is based on Schmitt’s metaphysical approach. For them, the political structures the social: ‘Antagonisms are not objective relations, but relations which reveal the limits of all objectivity. Society is constituted around these limits. [...] This is why we conceive of the political not as a superstructure but as having the status of an ontology of the social’ (Laclau & Mouffe, 1986, p. xiv), (Mouffe, 2005, p. 9).

## II. Form and content

The demand for a many-sided analysis of law is made more specific in the work of Nikos Poulantzas. In his 'Marxist examination of the contemporary state and law', Poulantzas focuses on the interrelation of two core principles of the Marxist analysis of state and law, i.e. the class nature of state and law, as well as their relative autonomy. He argues that the purpose of a Marxist analysis is 'to criticise the reification of law by exposing its mediated relationship to the economic base, whilst respecting the specificity of law in its historical genesis' (Martin, 2008, p. 5). This necessarily leads to an internal-external analysis of law, i.e. a bidirectional analysis which examines the dialectical relation of the legal superstructure to the base (external), together with the specificity of a normative model of law (internal) (Martin, 2008, p. 5).

Following Poulantzas, our analysis of the form of public law acknowledges the interrelation of the class nature and the relative autonomy of law, and the importance of a double-headed analysis of the two in their unity. The analysis of the dualistic form of public law in the following chapters will involve both the internal aspect of the examination of the main concepts of liberal constitutional theory (such as 'popular sovereignty', 'social contract', 'general will', 'norm and decision', 'norm and exception', 'constituent power') in their internal unity, and the external aspect of examining their relation to the development of socio-economic conditions. For this reason, each of the following chapter will focus on either or both of the aspects of this analysis.

For instance, the second and third chapters will focus on the internal aspect of the analysis, i.e. the specificity of the function of principles central to public law and their historical genesis. Principles (such as 'popular sovereignty', 'legal subject' and 'general will') and conceptual pairs ('norm-decision', 'individual-general will') will be examined in their interaction with each other, but also in their relation to the reproduction of a specific property regime. Furthermore, the fourth chapter is an examination of the change in the form of exercise of public power in mid-war Germany, from the Weimar Republic to the Nazi state, focusing on these two aspects: on the one hand, on the change and continuity of concepts used for the legitimation of the regime; on the other hand, on the relation of these changes to the intensification of socio-economic contradictions in mid-war Germany. Last but not least, the analysis in the fifth chapter concludes with an examination of the internal unity of principles used by the judiciary and the law-making mechanisms (of the European Union and the Greek government) to legislate in the context of a crisis-ridden Greece after 2010.

In this context, our analysis will be asking questions such as: Which are the concrete conditions that have necessitated the form of the state of exception? What is the relationship between the -prima facie opposite- forms of the rule of law and of the state of exception? Investigating the answer to these questions requires a preliminary elaboration on the conceptual pair of form and content in order to show how this analytical tool can be used in a dialectical analysis. Let us take upon the example of property as a social relation and a legal phenomenon.

To begin with, property relations are of fundamental importance in the capitalist mode of production, for the capitalist ownership of the means of production -as reflected in private law and safeguarded by the objective legal order as organised by public law- results in the capitalist ownership of the final product, and enables the extraction of surplus value. Additionally, the property of the individual must be easily alienable in the market. Consequently, a modern property regime is a social relation based on exclusion, hence, in need of a centrally organised system of violence. What is more, modern capitalist property relations are relations rid of the intersubjective relations of subjugation of the feudal society. The system of violence upholding the feudal property relations was more decentred, corresponding to a different mode of extraction of the surplus product through extra-economic means<sup>6</sup>. The relation between a property regime and a system of violence is the point where law relates to the state and private law relates to public law. The intermediation of the two, captured in the concept of the objective legal order, is one of the fundamental aspects of the analysis of the legal form. Complementary to this concept, the modern legal form of property presupposes the notion of the legal subject.

Let us see how the form and content dialectics can explain the nature of the property relation. Marx's theory of value reveals how the form of value in the world of commodities hides behind the things/commodities the social character of the sum of individual labour, i.e. the social relations between individual labourers. Here, too, the form is a one-sided relation between a person and thing. The common sense notion of property refers to a thing (a house, a car, a briefcase, money). 'This is my property' says someone to exclude everyone else from the enjoyment of this thing or resource. But the substantive content is a social relation which is expressed in the form of a thing. Behind the form of the thing/object, lies a system of relations, not only between a subject and the object but also between different subjects as well. And the

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<sup>6</sup> For a debate on the transition from the feudal to the capitalist property relations, see (Hilton, Sweezy, & Dobb, 1978). This debate focuses on the issue of the factors at work in this transition, and whether these were internal in nature (the contradictory nature of the feudal mode of production) or external. For an argument on the role of class struggle and the development of capitalist relations through market dependence in the English countryside, captured in the concept of 'agrarian capitalism', see (Aston, Philpin, & Brenner, 1985), (Wood E. M., 1998).



substantive content of the property relation itself is abstract if seen in-itself; if we do not move in the analysis of these social relations and their development.

As a result, for the many-sided analysis of the form of property, we have to look into its relation with the simple commodity relation within the social formation. For, first and foremost, it is the demands of commodity production-exchange that necessitate the form of the 'free and equal legal subject'. In particular, the sale and purchase of labour-power as a commodity is the fundamental element of capitalist relations. The worker, who has no property over means of production, has to sell his labour-power as a commodity. He must become a legal subject, i.e. owner of his labour-power, free and able to enter into an exchange of his labour-power for wage as an equal party with the capitalist, the owner of the means of production.

Therefore, the legal subject is a mask in which the economic relations are personified. Behind the legal subject as possessive individual lies: the possessor of commodities; the possessor of capital; the possessor of labour-power; the possessor of land. Therefore, property and contract, the two main legal relations, necessitate the existence of the legal subject as a free and possessive individual. But the process of consumption of the commodity labour-power, bought in an abstract process of exchange like any other commodity, takes place in *the depths of the production process*. So that the central function of the abstract legal form is the obfuscation of the exploitative content through this mediation. For this reason the *legal form*, as a form of these historically specific socio-economic relations, is characterised by the principles of equality, freedom, and voluntariness of the parties.

With regards to the public legal form, the argument is that it has to be seen together with the socio-economic content, to the reproduction of which it contributes. On this basis, unity of form and content means that socio-economic and political contradictions are to account for the change in the form of exercise of public power. The public legal form plays a crucial part in the reproduction of capitalist relations of production, as it abstracts from the contradictory socio-economic content in order to contribute to its reproduction. Moreover, the change in the public legal form is contingent upon the intensification of these socio-economic contradictions. For instance, and as will be discussed in the following chapters, the welfare form of Weimar Republic was contingent upon the intensification of contradictions in mid-war Germany that led to the need for intensified exploitation. This need meant that the state had to assume a different, more authoritarian form, as the Weimar form was in 1933 in contrast with the content it helped reproduce in 1919.

We reach the conclusion that the many-sided analysis of the legal form presupposes the examination of law in its unity with the state and other elements of the superstructure, and with the elements of socio-economic base, which make up the totality of the social formation. This analysis has to be bi-directional, as the legal form develops its own historicity, while it shapes and is being shaped by socio-economic development. Althusser's conception of the reproduction of the relations of production and the concept of class struggle, which we now turn to, are crucial for the grasping of the interrelation between the elements of this totality. But it is even more important to grasp that the economic content and the legal form are abstract constitutive elements -i.e. two sides- of one and the same actual relation. These abstract economic and legal relations do not exist in their 'pure form' in empirical reality; only in the field of scientific abstraction can the legal form be separated from its content (Lapayeva, 1982, p. 55). The dialectics of the economic content and the legal form presupposes their internal and mutual relation in the unified actual relation of capitalist commodity production, which is economic in its content and legal in its form. Only in the context of such a unity can the substantive content give birth to and determine its form (Lapayeva, 1982, p. 55).

### III. Reproduction of the relations of production

We saw above how the demand for many-sidedness in the analysis of law is translated into a bi-directional analysis, based on the principles of the class nature of law and state and relative autonomy. Let us now turn to the concepts necessary for this analysis, namely the 'reproduction of the relations of production', 'class struggle', and 'relative autonomy'. To begin with, the totality and the unity of the elements of a social formation where the capitalist mode of production is dominant is the central theme in Althusser's 'On the Reproduction of the Relations of Production'. Althusser argues that base and superstructure are parts of a unity in which 'the effect produced by the superstructure is simultaneously to *ensure the conditions* under which this exploitation is carried out (through the Repressive State Apparatus) *and the reproduction* of the relations of production (through the Ideological State Apparatuses) (Althusser, 2014, p. 93).

Therefore, the social formation dominated by the capitalist mode of production endures as long as the reproduction of the conditions of production is ensured; the latter endures as long as the reproduction of the relations of production is ensured; and, finally, the latter endures as long as the superstructure ensures the reproduction of these productive relations. In order for this 'topographical representation' not to be rendered a formalistic schema, Law, State, and Ideology

must be seen only as distinct aspects of a unity of diverse aspects. It should be remembered at all points that they cannot exist in pure state; they cannot be separated in real life; but legal, political and ideological phenomena must be analysed in their developing interrelations and interdependence. Let us see whether Althusser's analysis manages to fulfil this dialectical criterion in his analysis of law. First of all, according to his analysis, elements of the superstructure belong to either of two 'levels' or 'instances': the political-legal level (law and the state) and the ideological level (the various ideologies: religious, moral, legal, political, and so on) (Althusser, 2014, p. 53). As is obvious, law is found in both instances of the superstructure.

This is consistent with Althusser's fundamental premise on the materiality of ideology, as exemplified in the statement that 'every state apparatus simultaneously combines functioning on repression with functioning on ideology'. But it is also evidence of a point specifically related to the function of law within the social formation. Law, for Althusser, is the Ideological State Apparatus whose specific dominant function is, not to ensure the reproduction of capitalist relations of production, which it also helps ensure (in, however, subordinate fashion) , but *directly to ensure the functioning of capitalist relations of production* (Althusser, 2014, p. 169). That law is the specific apparatus articulating the superstructure upon and within the base is a position which resonates with the argument we developed earlier, namely that law facilitates the functioning and the reproduction of socio-economic relations while legitimating their origin and operation. Juridico-political forms are seen in their unity with socio-economic relations in their historical development.

To confirm this point, Althusser looks at the main characteristics of law, which he sees as a system of codified rules. He focuses on Private Law which in the last instance consists of 'property rights', which in their turn are derived from the following general legal principles: legal personality (what we analysed above under the concept of legal subject); the legal freedom to 'use and abuse' the goods one owns; and equality before the law (Althusser, 2014, p. 57). Apart from these general legal principles, law exhibits three fundamental characteristics: systematicity<sup>7</sup> (consistency and comprehensiveness); formalism<sup>8</sup> (with its correlative systematicity constituting

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<sup>7</sup> Law necessarily takes the form of a *system* which, by its nature, aspires to *internal consistency and comprehensiveness*. [...] Insofar as law is a system of rules that are applied there has to be *consistency among all the rules of the system, such that one cannot invoke one rule against another*. [...] That is why law tends to eliminate all possibility of internal contradiction. [...] At the same time, however, law must be comprehensive. In other words, it must represent a system of rules which, tendentially, *cover every case that could possibly present itself in 'reality'*, so that one is not brought up short by something that is not juridically 'covered' (Althusser, 2014, p. 58).

<sup>8</sup> Law is necessarily *formal*, in that it bears not on the content of what is exchanged between legal persons in of purchase and contracts of purchase and sale, but on the form of these contracts regulating exchange, a form defined by the (formal) acts of legal persons who are formally free and equal before the law. It is to the extent

the formal universality of law); and a repressive nature ('Law is repressive in that it could not exist in the absence of a corresponding system of sanctions'; this implies not merely the existence of penal law but of public law, i.e. a codified system of relations between the different institutions regulating the application of legal provisions).

The third characteristic is a proper dialectical insight because it implies that private law is seen in its dialectical unity with public law and penal law. As far as the first two characteristics are concerned, they evidently comply with the dialectical analysis of the legal form. According to Althusser, law's formalism and its correlative systematicity constitute its formal universality: the law applies to -and may be invoked by- every person legally defined and recognized as a legal person (Althusser, 2014, p. 59). However, Althusser continues, law's formalism by no means makes the different contents to which the form of law is applied disappear by enchantment.

Quite the contrary: the *formalism of law makes sense only to the extent that it is applied to defined contents that are necessarily absent from law itself*. These contents are the relations of production and their effects. Hence we can begin to see that: 1) Law only exists as a function of the existing relations of production. 2) Law has the form of law, that is, formal systematicity, only on condition that the relations of production as a function of which it exists are completely absent from law itself (Althusser, 2014, p. 59).

The conclusion is reached that Althusser's analysis, based as it is on the concept of the reproduction of the relations of production, is not only compatible with the above analysis of the legal form as form of a specific economic content, but also explains this form precisely as conditioned upon the absence of this content, furthering, thus, the understanding of the complex relations between the different levels of the juridico-political superstructure and the socio-economic relations of the economic base. Undoubtedly then, Althusser's analysis of law as a formal, systematized, non-contradictory, (tendentially) comprehensive system that cannot exist all by itself, contributes to a many-sided understanding of the legal phenomenon in its dialectical unity with political, ideological, and socio-economic processes. Althusser's analysis guards against subjectivist, but also against mechanistic, interpretations of the relation between law and social classes. Let us elaborate by looking at the following passage:

Certain Marxists, and by no means the least of them, have 'fallen' to the wrong side of the path on the ridge by presenting the state as a mere instrument of domination and repression in the service of objectives, that is, of the dominant class's conscious will. This

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that law is formal that it can be systematized as tendentially non-contradictory and comprehensive (Althusser, 2014, p. 59).

is a bourgeois, instrumentalist-idealist conception of the state reinforced by a bourgeois idealist (humanist) conception of social classes as ‘subjects’ (Althusser, 2014, p. 72).

Althusser’s warning against metaphysically presenting the state as a mere instrument of domination and repression is a valid statement of a dialectical analysis of law, and sets the requirements for a more thorough analysis with regards to the conception of social classes as subjects. Of course social classes must not be seen in a metaphysical way, as unified subjects. However, that the bourgeoisie is not a unified subject (i.e. the existence of conflicting interests and different tendencies within the bourgeois class itself) does not mean one has to resort to a mechanistic way of viewing the relation between phenomena of the base and those of the superstructure.

It is argued, therefore, that this important analysis of law’s form and function in the reproduction of the relations of production has to be coupled with the dynamic concept of class struggle, which takes into account the social and economic contradictions and the developing conflicting social interests. Classes should not be seen as metaphysical subjects. But, as they occupy a specific place within the relations of production they have objective interests on the basis of which they act as agents of production. This means that, on the one hand, we have to take into account class and intra-class contradictions, by concretely analysing the concrete situation. The state’s role in the social formation, its function in reproducing the relations of production cannot be fulfilled unless it is a ‘relatively autonomous’ state which reflects the class struggle, the contingent correlation of powers. On the other hand, it also means that the economic power of the class of owners of means of production is consolidated and expressed in the form of political-state power.

Consequently, the state is a class (i.e. bourgeois) state; yet it is a class state which reflects the class struggle, as is evident, for instance, in the different forms with which the ruling class exercises its power in different socio-historical conditions. The different forms of exercise of state power (and ultimately the difference between the ‘rule of law’ and ‘the state of exception’) are evidence of the relatively autonomous nature and of its being reflective of the class struggle and the degree of intensification of class antitheses and intra-class conflicts. The concept of class struggle manages to capture the historical level of intensification of the socio-economic contradictions, as well as the social needs and interests related to these objective contradictions, central among them being the need for safeguarding the existence of the bourgeois state. It is obvious then that in order for Althusser’s formalistic schema not to remain a one-sided analysis, it has to be supplemented by the concepts of ‘class struggle’ and ‘relative autonomy’.

#### IV. Class struggle and relative autonomy

A point that might be raised against the dialectical materialist analysis of law and the state regarding the concept of class is to claim that there is no necessary link between a unified social subject, with interests arising from its class position, and legislation. This argument is put forward by Hugh Collins who invokes Marx's own analysis of the Factory Act of 1844, a piece of English legislation designed to control the hours of work of women and to impose more severe restrictions upon the use of child labour. According to Collins, a simple class-interest analysis would suggest that this Act was a great victory of the working class for it ameliorated their conditions of work (Collins, 1982, pp. 46-47). However, Collins indicates in Marx's own analysis three other factors at work causing smaller groups to support the passing of the Act.

*First*, manufacturers who had conformed to the spirit of earlier laws on the same subject wanted protection from competitors who were successfully avoiding the controls on child labour, so they supported a tightening up of the laws to close loopholes, thus preventing further undercutting of prices through the use of cheap labour. *At the same time*, according to Marx, manufacturers generally wanted a political alliance with the working class in industry in order to force a repeal of the Corn Laws. A *final* group supporting the Factory Act was the landlords, who were feeling the squeeze on the level of rents as a result of the progressive impoverishment of the working class. Whether or not these insights into the motivation of groups are historically accurate, the whole analysis demonstrates Marx's own rejection of simple class-based descriptions of the origins and functions of laws (Collins, 1982, pp. 46-47).

We argue that what is shown in Marx's analysis, as presented above, is precisely the opposite of what the author wants to indicate. In fact, what the above analysis shows is that in order to assess law's content one has to look into the totality of relations of production, shaping the class interests of different social classes, as mediated through class struggle. It is the dialectical unity of the above which determines the legal form and content. Not only are classes in the above analysis defined on the basis of their relation to the means of production (working class, manufacturers, and landlords are referred to in Marx's analysis, and not some kind of group that became politically effective), but the above analysis manifests in crystal clear terms that intra-class contradictions and competing interests are diverse aspects of the concept of class struggle.

At this point our analysis has to also be distinguished from the arguably idealist approach to the concept of class, which views class as a product of political articulation. Classes, it is argued, are

not to be found as already in existence but have to be produced through political activities (Bocock, 1987, p. 103). This approach, exemplified in Ernesto Laclau and Chantal Mouffe's 'Hegemony and Socialist Strategy, is 'grounded in privileging the moment of political articulation' (Laclau & Mouffe, 1986, p. x). According to this approach, a class is created by the consciousness and political practice of its members. It is a matter of consciousness to which class one belongs, not a matter of social relations. The question then is: Does the fact that a worker does not join in a strike or protest mean that he is not a worker?

From a dialectical standpoint, Laclau and Mouffe conflate two different issues and processes: the first is the process of the development of relations of production, which results in the developing class position of different groups; a process manifested, for instance, in the proletarianisation of the self-employed social strata; the other is the process of achieving class consciousness. These two processes are intertwined and the relation between these processes is similar to the one between *dynamis* and *energeia* (in Aristotelian terms) or between the *in-itself* and the *for-itself* (in Hegelian terminology). As a result, the anti-essentialism of Laclau and Mouffe has validity if it is taken to mean that classes are not predetermined metaphysical subjects, but are produced by the development of the mode of production; so if the tendency is for areas of self-employment, such as lawyers and doctors for instance, to become proletarianised, then these strata could be considered among the working-class.

The issue of class consciousness is dialectically related to this but it is certainly not constitutive of the relation of a class to the means of production. For Laclau and Mouffe, on the contrary, any connections among groups in a society have to be politically articulated, and maintained. Outside of the articulatory practice there are no social interconnections. This is an arguably idealist position<sup>9</sup>. A comprehensive analysis of classes and class theory falls outside the scope of our investigation. Such an exhaustive external analysis would have to focus on the post-War movement of Capital, in order to understand, and situate historically, the shift from social classes, as a methodological tool of analysing social inequalities, to identity strategies (Alexiou, 2002), (Wood E. M., 1999). It has been argued that these conceptualisations are linked to the ideological hegemony of the middle strata, i.e. to a social restructuring which added more flexible, post-Fordist elements in production and to the post-war development which sought for new social spheres and demands to be subsumed under Capital (Alexiou, 2002).

However, from a Marxist standpoint it is acknowledged that, at a high level of abstraction, class struggle in capitalist social formation is carried out between two main classes: capital and labour.

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<sup>9</sup> For a critical reading of Laclau and Mouffe's 'Hegemony' which sees their analysis as reducing Marxism to a few dogmatic absolutes by presenting it on the basis of absolute distinctions, see (Geras, 1987).

Of course, a comprehensive class analysis has to take into account not just the two main classes, but also intermediate strata, as well as class fractions within these classes. And the above have to be viewed together with transnational configuration of interests, as in the case of the intra-EU, and international competing interests, which will be seen in Chapter Five as shaping the process of the Greek crisis legislation.

The analysis of the concept of class struggle, as an essential element of the dialectical analysis of law and, in particular, the legal form, is necessitated by the antinomies of law's formalism. Struggle, i.e. force mediating conflicting economic interests, decides between formally equal rights. Marx's analysis manifests this clearly enough. The intense class struggle around the legislation on the length of the working-day reveals the clash of interests and wills of antagonistic classes beneath the voluntary legal relation of equal individuals. The dialectical materialist analysis leads from the abstract legal relations towards the political relations between classes, the class struggle for the reflection of antagonistic class interests in state policy and legislation.

The capitalist maintains his rights as a purchaser when he tries to make the working day as long as possible, and, where possible, to make two working days out of one. On the other hand, the peculiar nature of the commodity sold implies a limit to its consumption by the purchaser, and the worker maintains his right as a seller when he wishes to reduce the working day to a particular normal length. There is here therefore *an antinomy, of right against right, both equally bearing the seal of the law of exchange. Between equal rights, force decides* (Marx, 1976, p. 344).

It is argued that the relationship between law and productive relations cannot be understood clearly unless seen in its dialectical unity with the socio-economic contradictions which give rise to conflicting interests in a class-divided society. In particular, with regards to the form of public law, class struggle is to be understood as a dynamic process of intensification of social (class and intra-class contradictions) contradictions which necessitates changes in the form of exercise of public power whenever there is a 'need'. In this context, class struggle is conducted by social classes (internally contradictory themselves), on the basis of competing socio-economic interests which are determined by the social relations and, in particular, by the place occupied by these classes in the production process.

It is, thus, the contradictory nature of the capitalist formation itself, which necessitates class struggle. And the intensification of class struggle may result in the inability of specific state forms to accommodate the reproduction of the contradictory capitalist relations. This may, consequently, mean that normal or liberal forms of decision-making may be replaced by



exceptional or authoritarian ones. ‘Norm’ and ‘exception’ as forms correspond to different concrete historical situations, i.e. to different levels of intensification of social contradictions. Both norm and exception serve the purpose of reproducing the property and productive relations, but with different means and in different circumstances, the specificity of which has to be taken into account for the change in form to be explained.

Therefore, the content has to be seen in its unity with the form if we are to account for the change in the latter. And the content is here identified with class struggle. In the final chapter, the Memorandum as form of implementation of anti-workers’ legislation will be examined with reference to the level of intensification of social antagonisms. The majority of the measures found in the Greek Memoranda are prescribed in various EU documents, such as the EU Commission White Paper on Growth and Competitiveness of 1993. The fact that they were introduced in the form of Memoranda of Understanding, however, can only be explained if we take into account the intensified level of socio-economic contradictions which followed the global crisis of 2008.

Seen in this light, the concept of class struggle comprises of two aspects: the aspect of class contradictions between the dominant/exploiting class and the subservient/exploited classes; and the aspect of intra-class contradictions between different fractions of the dominant class itself. Consequently, the state and legal form change and function with reference to both class and intra-class struggle. In fact, as we shall see in the analysis of the change from the Weimar Republic to the Nazi state form, the state objectively functions to consolidate the bourgeois rule and ensure its reproduction by unifying the different fractions of the dominant class both against the common enemy and against centrifugal tendencies. It is accurate then to say that the primary class interest and the primary class function of the state is the security and reproduction of bourgeois rule; but, the form of exercise of public power to protect this primary interest is simultaneously informed by a variety of other conflicting (class and intra-class) interests.

In order for the class function of the state and law to be understood it is necessary to refer to the concept of ‘relative autonomy’. In fact the class nature and the relative autonomy of the state and law are intrinsically linked to one another. Relative autonomy is necessary for the state to act as a factor of cohesion and consolidation of class power (intra-class aspect), as well as for the effective exercise of class rule (class aspect). As E. P. Thompson puts it with regards to the latter, the essential precondition for the effectiveness of law, in its function as ideology, is that it shall display an independence from gross manipulation and shall seem to be just; if the law is evidently partial and unjust, then it will mask nothing, legitimise nothing, contribute nothing to any class’s hegemony (Thompson, 2013, p. 263). Along the same lines with regards to the former, according to Poulantzas, capitalist law appears as ‘the necessary form of a State that has to maintain relative

autonomy of the fractions of a power-bloc in order to organize their unity under the hegemony of a given class or fraction' (Poulantzas, 2000, p. 91).

Furthermore, the relatively autonomous nature characterises both the capitalist state (which 'best serves the interests of the capitalist class only when the members of this class do not participate directly in the state apparatus, that is to say when the ruling class is not the politically governing class' (Poulantzas N. , 2008, p. 179)) and the law in a capitalist social formation (which, according to Engels, 'must not only correspond to the general economic condition and be its expression, but must also be an internally coherent expression which does not, owing to inner contradictions, reduce itself to nought; and in order to achieve this, the faithful reflection of economic conditions suffers increasingly' (quoted in (Lukacs, 1975))).

The concept of 'relative autonomy' is crucial for grasping the role of law and the state in a social formation, as well as the relation between class and law/state. It also pre-empts any characterisation of the dialectical conception of this relation instrumentalist. As Poulantzas puts it in his reply to Ralph Miliband's empiricist argument, 'the relation between the bourgeois class and the state is an *objective relation*; this means that if the function of the state in a determinate social formation and the interests of the dominant class in this formation coincide, it is *by reason of the system itself*' (Poulantzas, 2008, p. 178). Therefore, according to Poulantzas, it is not necessary for class interests and the functions of the state always to coincide; the state serves class interests by virtue of its function as the 'factor of cohesion' (Martin, 2008, p. 12).

To sum up, classes are not metaphysical subjects producing superstructural objects. The relation between class and law/state is not one of unilateral action of a subject upon an object. The state and law (and consequently the state and legal form) objectively function to reproduce the relations of production to the benefit of the exploiting class. This constitutes their class nature. This means that changes in relations of production and the development of the process of class struggle, i.e. the intensification of socio-economic contradictions, lead to modifications of the state and legal form. These relations can only be understood through the relative autonomy of state and law from the socio-economic contradictions. The relatively autonomous nature precisely allows the state and law to be responsive to the intensification of socio-economic contradictions and fulfil their function in a social formation more effectively.

## V. Forms of exercise of public power

It would be wrong to assume from the above that the function of the state is a negative function, i.e. a function restricted to reflecting bourgeois interests in their immediate appearance. The state also acts ‘in a positive fashion, creating, transforming and making reality’ (Poulantzas, 2000, p. 43). Additionally, law ‘does not only deceive and conceal, nor does it merely repress people by compelling or forbidding them to act; it also organizes and sanctions certain real rights of the dominated classes; and it has inscribed within it the material concessions, imposed on the dominant classes by popular struggle’ (Poulantzas, 2000, p. 84).

The problem of state and law’s positivity (either in the form of labour law, the welfare state, or even in the form of an individual judicial decision sanctioning the rights and interests of members of the dominated classes) has been a most challenging problem for the Marxist analysis of law and the state. The question is: Does the state lose its class character when it legislates the regulation of the working-day, when it sanctions positive rights for the dominated classes? Can it be argued that such laws, which in their immediate appearance serve the interests of the dominated class, also respond to a -perhaps not immediately evident, but as vital- need for the reproduction of a class-divided society?

Let us give an example of positive for the dominated classes laws which can be accounted for by the contradictory nature of the capitalist social formation. The example comes from Marx, who characterised the English Factory Acts *as the negative expression* of the appetite for surplus labour. ‘These laws curb capital’s drive towards a limitless draining away of labour-power by forcibly limiting the working day on the authority of the state, but a state ruled by capitalist and landlord’ (Marx, 1976, p. 348). If the tendency of capital towards the expansion of the working-day without limits was inexistent, there would be no reason for the introduction of such legislation, which, albeit being contrary to the immediate interests of the capitalist class towards unlimited expansion, serves better the capitalist class *in a more indirect manner*; by preserving the labour-force from being exhausted, by avoiding civil unrest, etc. Therefore, it is the contradictory nature of the capitalist relations of production/exploitation which necessitates the sanctioning of positive measures for the dominated class in order to ensure the reproduction of these productive relations.

This is the prism under which one can approach in its many-sidedness the phenomenon of labour legislation. Despite its immediate appearance as promoting the interests of the dominated classes, it ultimately ensures the reproduction of the capitalist relations of production. On the face of it,

the deterioration of working-class conditions and -what is the legal expression of the same- the onslaught against working-class rights is in the interest of capitalist enterprises, because deregulation of labour has the direct effect of reducing the cost of labour, hence increasing capitalist profits, by increasing exploitation. However, and to focus on one limited aspect of the contradictory implications, increased exploitation and the fall in real wages entail the reduction of the buying-capacity of working-class -a point raised by the Greek Prime Minister in his talk on the annual congress of the Hellenic Federation of Enterprises (SEV)<sup>10</sup>. Additionally, increased exploitation might lead to civil unrest -even though the two processes of deteriorating material-economic conditions and developing class-consciousness are not related in a mechanistic manner. So, in order to explain the phenomenon of labour law or the welfare state, one would have to examine the unity of socio-economic and political contradictions.

One could argue that Poulantzas's investigation of the problem of the positive measures the state adopts for the dominated classes is what leads him to define the state as 'a relation, or more precisely as the condensate of a relation of power between struggling classes' (Poulantzas, 2008, p. 283). From the rejection of the instrumentalist conception of the state, Poulantzas concludes that the state should be regarded 'like capital', as 'a relationship of forces, or more precisely as the material condensation of such a relationship among classes and class fractions' (Poulantzas, 2000, p. 128). The question arises: if the state is a condensation of a relation forces, does this mean that the state is indifferent to the struggle of those forces? Is it neutral to it? Dimitris Kaltsonis answers this question in a manner which qualifies Poulantzas's definition:

Any correlation of forces contains, with the exception of transitional historical periods, a *dominant component*. It ultimately contains the socio-economic and political component which holds the *monopoly of power in both economic and political level*. As a result, any reflection of the correlation of forces on the legal superstructure finds its *absolute limit* on this: it cannot supersede the fundamental component, i.e. the ruling class, its state, and its legal system. Any integrated legislative conquests of the subordinate classes are always secondary. The dominant economic and juridico-political system fully assimilates them (Kaltsonis, 2005, p. 31).

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<sup>10</sup> 'The growth we need and want must respect labour rights in order to strengthen internal demand' (Tsipras, 2015). The relation between capitalist growth and labour legislation will be examined in the final chapter, in the context of the intensification of socio-economic contradictions after the global crisis of 2008. These contradictions were confirmed by OECD's assessment for weak global growth in 2016-2017 and its prompting for public investment which would boost demand (OECD, 2016). Therefore, not only the Memoranda legislation, but also the recent attempts of legislation by the Greek government for the 'humanitarian crisis' and the re-introduction of collective bargaining have to be assessed within this context and have to be seen as different forms of ultimately ensuring the reproduction of the capitalist relations of production.

As much as it is wrong to assume that state and law are a mere reflection of the interests of the ruling class, it is equally wrong to conclude from the falseness of this assumption that the state and law shed their class nature because they assume a more liberal or democratic form or they adopt positive measures for the non-dominant classes. The state assumes different forms based on the concrete level of intensification of socio-economic contradictions (class struggle and intra-class conflicts). Nevertheless, these forms accommodate the fundamental characteristic of the state in the reproduction of class rule and of the conditions of production. In his definition of the state, Poulantzas seems to be focusing on the former while completely ignoring the latter.

In parallel, to argue that the principle of the ‘rule of law’ cancels the class nature of the state and law is to disregard the existence of emergency provisions in every constitutional regime and the intricate relation between norm and exception. The fact that constitutional democratic states exercise their public power on the basis of the principle of the ‘rule of law’ does not negate the fact that ‘the State often transgresses law-rules of its own making by acting without reference to the law, but also by acting directly against it’ (Poulantzas, 2000, p. 84). The principle of the ‘rule of law’ captures a form of exercise of public power different from the arbitrary decision-making of absolute monarchy.

Similarly, the welfare state is a different state form from the neo-liberal state. The fact that post-War Western states assumed the form of the welfare state (a form encountered even earlier than that, for instance in the Weimar Republic) does not negate the fact that the adoption of this form was contingent upon the post-war movement of capital and the development of class struggle, and upon factors that contributed towards the reproduction of capitalist division of labour<sup>11</sup>. This is all the more evident nowadays with the generalised onslaught against workers rights and the elimination of the welfare state by neo-liberal policies.

On this basis, Chapters Four and Five will examine the change in the public legal form as contingent upon the intensification of socio-economic and political contradictions. In mid-war Germany, the reproduction of conditions of intensified exploitation for the extraction of absolute surplus value, could not be accommodated by the liberal and welfare form of the Weimar Republic. The public legal form had to get rid of its welfare and socialist elements, and assume a

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<sup>11</sup> A comprehensive and systematic analysis of the socio-economic contradictions necessitating the welfare state form falls outside the scope of our analysis. This would have to take into account, however, the need to facilitate the expanded reproduction of social capital following the second World War as well as the investment of capital in enterprises not immediately productive, i.e. not contributing towards the increase of the surplus value extracted, but on the reproduction of the conditions of production and on the realisation of the produced surplus value. These two developments led to the growth of sectors (i.e. advertising, marketing, mass media, tourism, but also art, education, planning, design) and the creation of jobs which demanded a higher level of educational skills, therefore, creating a need for state-sponsored services.

more authoritarian form in order to perform its function of reproduction more effectively. Similarly, in the Greek case, the need for intensified exploitation, captured in the principle of ‘flexibility’ is accompanied by the strengthening of authoritarian elements and the distantiation of the popular strata from decision-making processes.

The starting point for a dialectical analysis of law and the state is the difference between these forms. This difference, however, can only be accounted for by looking at which specific socio-economic struggles and conditions gave rise to these forms. Consequently, this analysis will avoid abstracting and celebrating liberal democratic principles, such as the ‘rule of law’ or ‘popular sovereignty’. On the contrary, it will seek to examine the objective function of these principles in a class-divided society. Conclusions similar to E. P. Thompson’s celebration of the ‘rule of law’ as ‘a cultural achievement of universal significance’ (Thompson, 2013, p. 265) will be avoided in favour of a concrete analysis which sees the legal and political forms in their unity with socio-economic conditions.

We saw earlier that the law and state are relatively autonomous *because of* their class nature. And precisely this relative autonomy allows the law and the state to capture ‘the true meaning of new infrastructural realities’ (Poulantzas, 2008, p. 41). In fact, the more abstract, formal, general and codified a juridical-state structure is, the better it fulfils its class function, ‘by virtue of the formal, abstract liberty and equality that it crystallizes and the calculability that is grafted onto them’ (Poulantzas, 2008, p. 40). The more abstract and relatively autonomous a juridical-state structure is, the more capable it is of accommodating the intensification of social and economic contradictions.

The goal of our analysis is to examine how principles of public law (such as ‘general will’, ‘popular sovereignty’, ‘general interest’, ‘necessity’ etc.) objectively function to fulfil a social purpose, and how they change and relate to each other, thus giving rise to different forms of exercise of public power based on the level of intensification of socio-economic contradictions. The starting point of this analysis is that the general concepts deployed by the governing institutions serve a structural purpose, despite the existence of instances when law’s ‘relative autonomy’ and strive for internal consistency can be used to curve the some of the effects of these anti-workers’ policies albeit in a temporary manner (as for example in decision 2307/2014 of the Greek Council of State, which found unconstitutional a limited aspect of the labour-law regulations of the second Memorandum, i.e. the elimination of unilateral recourse to arbitration).

As we saw above, there is no need for class interests and the functions of the state always to coincide. Political power is not a matter of inter-personal linkages, but a matter of objectively

structured relations. The question which concerns our analysis is how precise values and principles, such as ‘general will’, ‘leadership’, or ‘general interest’, internally relate to each other in order to reproduce a system of power, property and productive relations. As Poulantzas puts it, ‘exploitation there certainly is; but through the mediation of what concrete values’ (Poulantzas, 2008, p. 27)? How do particular values operate and interact with each other within the (relatively autonomous) sphere of law, and how does this operation relate to the function of reproducing relations of exploitation? Let us then move on to the analysis of the specificity of public law principles and their process of genesis and interaction.

## Chapter Two: The Dualistic Form of Public Law

Evgevy Pashukanis, in his ‘General Theory of Law’ asks the question: *Why does law assume the form of law?* Following his line of argumentation one could argue that the legal form expresses a specific socio-economic content, i.e. specific property and exchange relations from which it abstracts, in a systematic and formalised manner. Pashukanis notes that the legal form assumes its full realisation in capitalism, and it is the capitalist relations of production, relations of property and exchange, that necessitate the existence of a legal subject, i.e. a private and egotistic individual, as well as of an objective system of norms in order to sustain the relations between these individuals.

We would subsequently ask: *Why does public law assume a dualistic form?* In the case of public law, law’s general function in reproducing the productive relations is concretised in providing authoritative legitimation for the exercise of public power. Therefore, public law assumes the dualistic form for the same reasons that law in general assumes it. But, more specifically, it assumes this form in serving the function of ensuring the legitimate exercise of public power which reproduces the class rule. The latter is achieved through the systematic operation of a set of principles which abstract from the socio-economic contradictions and relate to each other in a manner which can accommodate changes in the form of exercise of this power, depending on the level of intensification of these contradictions.

This chapter begins the substantive analysis of this unity of principles and concepts, such as ‘popular sovereignty’, ‘general will’ and ‘social contract’, and the various formal dualisms associated with these central concepts, such as ‘objective and subjective law’ and ‘norm and decision’. This analysis will concentrate on the internal mechanism of operation of these principles and the manner they relate to each other. It will examine these foundational concepts at play in the process of legitimating the exercise of public power and it will challenge the general role of such concepts in a constitutional democratic regime generally.

Poulantzas’s methodological insight on a Marxist analysis of law can help us understand the analysis here pursued. In his ‘Marxist examination of the contemporary state and law’, Poulantzas argues that the purpose of a Marxist analysis is ‘to criticise the reification of law by exposing its mediated relationship to the economic base, whilst respecting the specificity of law in its historical genesis’ (Martin, 2008, p. 5). This necessarily leads to an internal-external analysis of law, i.e. a bidirectional analysis which examines the dialectical relation of the legal superstructure



to the base (external), together with the specificity of a normative model of law (internal) (Martin, 2008, p. 5).

Following Poulantzas, the analysis here pursued acknowledges the interrelation of the class nature and the relative autonomy of law, and the importance of a double-headed analysis of the two in their unity. Nevertheless, the focus of this chapter will be on the internal aspect of the analysis, i.e. the specificity of the function of principles central to the form of public law. As Poulantzas puts it, the relation between juridical norms and economic infrastructure is mediated through specific principles and values. It is precisely these values, such as liberty and equality, which grant legal norms a wider validity, ‘independently of any instrumental advantage to the bourgeoisie and despite their ‘reified’ status and role in sustaining alienated relations throughout civil society’ (Martin, 2008, p. 4).

The analysis of the specificity of principles such as ‘popular sovereignty’ and ‘general will’ requires an examination of how they operate and interact with each other within the (relatively autonomous) sphere of law, and how this operation objectively relates to the function of reproducing the productive relations of capitalism. It also requires examining the specificity of these principles in their historical genesis, since it is precisely this process of genesis of historical principles which mediates between base and superstructure. In this light we will revisit Schmitt’s famous statement: ‘All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development [...] but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts’ (Schmitt, 2004, p. 36).

To argue that all significant concepts of modern state theory are secularised theological concepts is to accept the relative autonomy of superstructural values and the systemic interaction of principles. Some of these principles are transplanted from the theological discourse to the legal, assuming thus a different form so as to accommodate changes in the social and economic relations and the form of exercise of public power. This is an important point for the many-sided analysis of the development of the legal form, and the form of public law in particular. This analysis takes place on the premise that different social formations, i.e. social formations where different modes of production are dominant, give rise to different forms of coercion and different forms of accommodating the power, property and productive relations.

The historically evolving forms of appropriation of the surplus product, by the owners of the means of production, give rise to different forms of exercise of the public power which accommodates this class exploitation. For instance, the extra-economic coercion dominant in

slavery and serfdom is replaced by the economic coercion in capitalism. In particular, the dominance of the conditions of production over the producers is hidden in slavery and serfdom through the relations of subjugation and servitude, while in capitalism through the legal relations of formal equality, freedom and independence of individuals. It follows that representative institutions of government are manifestly incompatible with social formations where class divisions are penetrated by different social statuses, parallel to the property differences. Consequently, representative institutions appear in a predominant way with the development of the capitalist relations of production.

Law exists in all kinds of class-divided societal formations, merged with religion or morals. But, in capitalism law becomes the dominant form in the superstructure and necessarily assumes a dualistic form of appearance, so as to secure the reproduction of the property and exchange relations necessary for the extraction (through the formal equality of labour contracts) of surplus value. The historical development of capitalist productive relations necessitates the conceptual development of legal forms and concepts. Therefore, the conceptual analysis must take account of this historical development and the dialectical approach must integrate points of historical analysis.

Under this prism, Political Theology has to be seen not as an autonomous sphere, but as the relatively autonomous superstructural sphere examined in its continuity. ‘All significant concepts of the modern theory of the state are secularized theological concepts’, means that there is continuity between the religious form and the legal form. Only bourgeois society creates all the conditions necessary for the legal element in social relationships to achieve its full realisation. However, the legal form appeared at a certain cultural level in a long embryonic stage, internally unstructured and barely distinguishable from neighbouring spheres, e.g. mores, religion. Then, gradually developing, it achieves maximum maturity, differentiation and precision. This higher stage of development corresponds to specific economic and social relationships. At the same time this stage is characterized by the appearance of a system of general concepts theoretically reflecting the legal system as a distinct whole (Pashukanis, 1951).

This is why this chapter begins the analysis of the dualistic form of public law with the doctrine of the ‘King’s Two Bodies’, a theologico-political doctrine which developed in the transitional period from feudalism to capitalism, and which captures the legal form in its embryonic stage, indistinguishable from the religious form. This doctrine lies at the origin of both the principle of limited government and constitutionalism and the principle of democracy. The limiting of one ‘Body’ by the other is the precursor of the idea of limited government, whereas the notion of the

Body politic of the sovereign King is one step away from the dispersal of sovereignty and the idea of a sovereign people.

Methodologically, this is not intended to provide a detailed historical account of the feudal period that gave birth to this doctrine, but to point towards the evolution of different forms of legitimating the exercise of public power in a social formation. More specifically, we aim to see how the legal form, which in its embryonic stage existed indistinguishable from other forms (moral, religious), developed its dualistic appearance. This chapter begins the examination of the internal unity of foundational concepts in their historical continuity with the doctrine of the King's Two Bodies. The concept of popular sovereignty and the idea of the social contract are subsequently discussed as the main sources of the constitution's authority. The necessary dualisms (e.g. individual and general will and constituent and constituted power) and the concepts presupposed for the functioning of this relatively autonomous sphere of public law are seen in the historical process of legitimating different forms of exercise of public power.

## I. The King's Two Bodies and the origins of constitutionalism

The major social and economic contradictions that led to the English Great Rebellion in the 17<sup>th</sup> century were already at work in the 16<sup>th</sup> century. Marx situates the historical process of primitive accumulation even earlier than that. Therefore, the 16<sup>th</sup> century in Britain was a period of major developing social and economic contradictions (Hilton, Sweezy, & Dobb, 1978), (Aston, Philpin, & Brenner, 1985), (Wood E. M., 1998). There is both rupture and continuity evident in the process through which these contradictions are reflected in the form of exercise of public power. The struggle for power between the feudal nobility and the rising bourgeoisie, was reflected in the transition between dominant forms of the superstructure, from the religious to the legal. But continuity was also evident in the manner that the fundamental division that existed within society was perpetuated, only with different classes occupying the places of the exploiters and the exploited. In order for the developing capitalist relations to be able to establish and reproduce themselves the regime *had to be legitimate, it had to be authoritative*.

At the time, absolute monarchy was the political form corresponding to the mercantile English society. A variety of legal and religious elements were employed for the legitimation of the Tudor monarchy, central among them being the doctrine of the King's Two Bodies. As we saw above, the legal form in its embryonic stage existed indistinguishable from other forms. In fact the concept of the two bodies of the King reveals the blurred and barely indistinguishable lines that

existed in the 16<sup>th</sup> century between the religious form and the legal form. This doctrine was developed by English jurists during the Tudor period, when the Acts of Supremacy of 1534 and 1559 established King Henry VIII and Queen Elizabeth I, respectively, as the supreme heads on earth of the Church in England, and opened the way for a political theology: ‘quod principi placuit legis habet vigorem’; ‘what pleases the prince has the force of law’. It was introduced in cases regarding property which the Lancastrian Kings had owned as private property and not as property of the Crown (Kantorowicz, 1998). Let us see how the doctrine was articulated in two of these cases:

- ❖ [T]he King has in him two Bodies [...]. His Body natural is a Body mortal, subject to all Infirmities that come by Nature or Accident [...]. But his Body politic is a Body that cannot be seen or handled, consisting of Policy and Government, and constituted for the *Direction of the People*, and the *Management of the public weal* (*Case of the Duchy of Lancaster* as quoted in (Kantorowicz, 1998).
- ❖ The King has two Capacities, for he has two Bodies, the one whereof is a Body natural, consisting of natural Members as every other Man has, and in this he is subject to Passions and Death as other Men are; the other is a Body politic, and the Members thereof are his Subjects, *and he and his Subjects together compose the Corporation, and he is incorporated with them and they with him, and he is the Head, and they are the Members*. [...] This Body [politic] of the King never dies [...], but there is a Separation of the two Bodies, and the Body politic is transferred and conveyed over the Body natural now dead [...] So that it signifies a Removal of the Body politic of the King of this Realm from one Body natural to another (*Willion v. Berkley* as quoted in (Kantorowicz, 1998).

The politico-theological image painted in the above cases fulfils both characteristics of public power, as outlined by Giorgio Agamben in his ‘The Kingdom and the Glory’: the Body politic, consisting of Policy and Government, being responsible for the *Direction of the People* and the *Management of the public weal*, fulfils the managerial aspect of power; on the other hand, both the Body natural and the Body politic, i.e. the King and his Subjects, form a unity, a Corporation, fulfilling, thus, the glorious aspect of power. We find here an image of identification of ruler and ruled: the King is the Head to his subjects-members. We will encounter similar images of identification in Schmitt’s constituent power and its association with the Führerprinzip. What is more, as Kantorowicz notes, the King, as the angels, does not grow old; his character *angelicus* has a *suggestive capacity for doing good and acting in the interests of the res publica, of the ‘salus populi’*. This identification of the sovereign’s will with the ‘right’ is a capacity of the

popular sovereign, too, as we see in Sieyes and later in Schmitt: ‘what the people will is always right’.

In the Elizabethan era this capacity was reflected in the divine depiction of the Queen. Queen Elizabeth I was depicted as Astraea, the goddess of justice on earth (Raffield, 2010). Whether as Astraea, or as the blindfold Justitia balancing scales and carrying a sword, Justice was always depicted as a feminine goddess. ‘Lex est omnium divinarum et humanorum rerum Regina’ was written in Justinian’s Digest. As a result of the use of this doctrine, the Queen in the Elizabethan era was identified with Justice and Law. Her authority had a divine source, a character *angelicus*. This divine origin betrays the religious remnants in this transitional form of legitimation. However, in the 1590s fear of invasion and rebellion led to expansive deployment of the Royal Prerogative, and to the Court of High Commission supplanting the jurisdiction of common law courts in ecclesiastical causes. The civil lawyers and clerics of the High Commission sought for them the right to decide what constituted ecclesiastical cause in any case. This problem of competing jurisdictions expressed the threat posed to common law tradition by the use of the Royal Prerogative (Raffield, 2010).

We are confronted with the conflict in the early modern constitutional history of England, between the King’s prerogative and the rationality of common law; between lex as imperial edict, and jus as unwritten lex terrae. It is crucial to note that both parties in this conflict claimed divine-natural authority as the source of their legitimation; the royal prerogative invoked the King’s authority as the head on earth of the Church, while common law invoked its expressing natural law as the earthly manifestation of divine law. For common law jurists, who find their rightful descendants in the rationality of Rawls or Habermas liberal theory, the absolute power of Chancery Court –the supreme court of the King’s prerogative- was a threat to the rule of law. Sir Edward Coke equated the supreme judicial authority of common law with the divine provenance of natural law of which common law was the rational and earthly manifestation (Raffield, 2010).

The main issue at stake in this conflict -which nonetheless reveals the developing role played by the legal elements found in the doctrine of the King’s Two Bodies as the dominant element of legitimation of the ruler’s authority- is the *principle of limited government*. In fact, the concept of the King’s two bodies, apart from the aim of providing divine authority to the office of the king reveals the intention of the judiciary to enforce the *principle of limited monarchy* (Loughlin, 2003). Charles I indictment in 1649 is an exemplary application of the doctrine: the King was ‘trusted with limited power to govern by and according to the laws of the land; trust he betrayed in favour of wicked design to uphold in himself an unlimited, tyrannical power to rule according to his will, overthrowing rights and liberties of people’ (Santner, 2011)

The principle of limited government has its roots in British constitutional history, as early as in the Magna Carta of 1215. This principle, apart from its central role in a form of exercise of public power different from the arbitrary rule of the monarch, serves an altogether important function as a legitimating mechanism. There is a dialectical relationship between limitation of power and augmentation of authority manifested in this principle. In fact, it is argued that the Magna Carta ‘limits the Crown as dominus, but upholds it as rex, accepting the strengthened Crown and its expanded jurisdiction, yet trying to eliminate the caprices of the individual monarch’ (Finer, 1999). The king’s authority was not questioned. Rather, it was enhanced because it was exercised through his council. ‘This work of the crown in council was gradually amplified through the formation of a parliament that came into existence as an act of royal will and as an instrument of royal government’ (Loughlin, 2003, p. 21).

Thus, it was the limitation of the power of a king in early modernity that provided him with the necessary authoritative legitimation for upholding the existing constitutional arrangement. Loughlin claims that it was Jean Bodin who first recognised the vital importance of limits on sovereign authority. ‘The less the power of the soveraigntie is the more it is assured’ (Jean Bodin, *The Six Books of a Commonweale*, as quoted in (Loughlin, 2003, p. 137). According to this line of argumentation, restrictions on power are authority-reinforcing, and limits on sovereign power are conditions for its exercise. The separation of the king’s two bodies, as well as the separation of office and person, was in line with this principle of limited government, which served to legitimate the political authority of a transforming superstructure (from the religious to the legal form) that in its turn sustained the developing power, property and productive relations.

An additional path to understand the effect of the doctrine is through the dualism of person and office. According to the formulation of the King’s Two Bodies doctrine, the sovereign is separated into two bodies: one consists of the person of the king, the Body natural; the other consists of the office of the king, the Body politic. *Officium* signifies a position of some permanence. Following the doctrine of the two bodies, the position assumes the status of an institution, wherein vests the public power, and not in the individual (Loughlin, 2003, p. 79). Herbert Marcuse, in his analysis of authority, traces this separation back to Luther, who saw clearly that the system of temporal authorities constantly depends on the effectiveness of authority, not only juridico-political, but also familial.

The earthly order appears as a system of ‘authorities’ and ‘offices’, as an order of universal subordination, and these authorities and offices in turn essentially appear under the sign of the ‘sword’. [...] The separation of office and person opens up a path which has far reaching consequences: it holds fast to the unconditional authority of the office,

while it surrenders the officiating person to the fate of possible rejection. ‘Firstly a distinction must be made: office and person, work and doer, are different things. *For an office or a deed may well be good and right in itself which is yet evil and wrong if the person or doer is not good or right or does not do his work properly*’ (Marcuse, 1972, p. 16).

The above analysis manifests that the authority of the office is much harder to question than the authority of the person. Thus, the separation of office from person, found in the doctrine of the King’s Two Bodies, functions as a mechanism of reification of authority. Authority is understood ‘as an element of a natural or divine feature of an institution or a person instead of as a function of social relationships’ (Marcuse, 1972). The function of this reification consists in the dignity of the office and the worthiness of the officiating person no longer coinciding in principle. The office retains its unconditional authority, even if the officiating person does not deserve this authority (Marcuse, 1972). To put it in different terms, the sovereign wills, and what he wills is always right by virtue of his office; even if the Body natural, i.e. the individual holding the office is wrong. Ultimately this issue refers to the relation of identity or representation between the ruler and the ruled.

Apart from this, the doctrine of the ‘Two Bodies’ has interesting implications regarding the relation between the different institutions of government. Some form of constitutional ordering is implicit in the doctrine of the King’s Two Bodies. The king as head and the people as members form a single body exercising a coordinated power, ensuring that one estate would not unilaterally impose its will on the others, containing the seed for the modern separation of powers (Loughlin, 2003). The principle of the separation of powers is, after all, the exemplary principle of the form of limited government. Martin Loughlin, as Montesquieu had done before him, locates the relationship between the balanced constitution and the separation of powers in the British constitutional settlement after the Glorious Revolution:

The ancient organic language of the mixed constitution was replaced by the mechanical metaphor of the balanced constitution, in which the *king, lords, and commons were presented as operating a complex system of checks and balances*. This shift in metaphor contained the seeds of innovation, especially since the idea of balance presupposed a separation of functions that was almost entirely novel in its conception (Loughlin, 2003, p. 23).

According to Loughlin, the metaphor of checks and balances between the three estates (the king, the lords, and the commons) contained the seeds of the idea of a separation of the three powers

(legislative, executive, and judiciary). There are two different kinds of relations in this formulation: on the one hand, a relation between different branches of the mixed constitution, and on the other a relation between the estates. Althusser in his critique of the principle of the separation of powers, and its ideological function, uses the terms *pouvoir* and *puissance* so as to differentiate between these two relations. In particular, he sees the separation of *pouvoirs*-powers as a means of securing the power of the ruling *puissance*-estate. He comes to this conclusion by, first, examining how the separation of powers is a myth, since: the executive encroaches on the legislature; the legislature encroaches on the executive by exercising rights of inspection; the legislature encroaches on the judiciary when setting itself up as a tribunal (Althusser, 1972).

The above is evidence that Montesquieu is not concerned with the *separation* of powers, but with their *combination*, their *fusion*, their *liaison* (Althusser, 1972). The fusion that concerns Montesquieu is not only the fusion of juridical powers, but the fusion and combination of the powers of the different classes. There are three *pouvoirs*-powers to be combined, as there are three *puissances*-estates to be combined: The King, the upper chamber, which corresponds to the *puissance* of the feudal nobility, and the lower chamber, which corresponds to the commons, the 'people'. It is crucial to note that the third *puissance*-estate carries the name 'people', a name that can be used to characterise the unity of the three terms. After all the king, and the nobles could be counted among the universal term 'people'. But this specific 'people' is a concrete universal which in Hegelian terms determines the other two terms of the dialectic. The concrete universality of the people in late 17<sup>th</sup> century was expressed in the revolutionary class of the bourgeoisie rising to power.

In that context, Althusser argues that the combination of *puissances* is a political problem of relations of forces, and not a juridical problem concerning the definition of legality and its spheres. He analyses how divisions of *pouvoirs* serve the interests of one *puissance* against the others by asking the question: 'Which combinations of *pouvoirs* are absolutely excluded?' He goes on to find that the legislature cannot usurp the function of the executive, so the rights of the feudal nobility are protected against the people, which as we saw is a term that refers to the rising bourgeois class. The king, on the other hand, cannot usurp the power of the judiciary, so the rights of the feudal nobility are again protected by the arbitrariness of a king (Althusser, 1972).

Consequently, the doctrine of the separation of powers, rather than dividing sovereignty, bolsters the unity of the sovereignty of the ruling class. The absolute character and the unity of sovereignty -of the ruling class as we saw above- which was identified by Bodin, cannot be interfered with by the institutional constraints provided by the doctrine of the separation of powers. If anything, these institutional constraints can serve to secure and bolster sovereignty,



since its omnipotent power can be exercised ‘only through established form and defined procedures, and generally only in accordance with some basic understanding of the ‘proper’ uses of such power’ (Loughlin, 2003, p. 22). The function of this mechanism is evident in the case of parliamentary sovereignty and its relationship with the rule of law. In the same way as the limitations imposed upon the king by his council augment his authority, the limitations imposed by the rule of law on the absolute supremacy of the parliament strengthen its authority.

The analysis of the doctrine of the ‘Two Bodies’ has led us conceptually to the centre of the liberal democratic form of exercise of public power: the concept of constitutionalism. The constitution establishes and delimits the powers of government, lays down the principles of political engagement, and determines the relationship between the citizen and the state (Loughlin, 2003, p. 46). However, the above analysis shows that the institutional forms of constitutionalism serve an additional function. They bolster sovereignty and secure the reproduction of a regime of power, property and productive relations by ensuring the legitimate exercise of public power. The constitution is both limiting and enhancing the exercise of public power. Constitutionalism rests on the principle that constituent power resides in the political unity of the people, who delegate a limited authority to government to promote the public good. The modern constitution presents itself as a body of ‘fundamental law’, a document that receives its authorisation from the people. Based on this realisation, the source of the authority of the constitution is to be questioned next. The question of legitimacy goes through the concepts of the ‘people’, the ‘social contract’, and other related concepts which will be examined in the following section.

## II. The concept of popular sovereignty and the issue of representation

The analysis of the doctrine of the ‘Two Bodies’ revealed the origins of the principle of constitutionalism in early modernity and the liberal principle of limited government. Our analysis of the internal coherence and unity of concepts of public law will continue with the second major component of liberal democracy, namely the democratic principle as captured in the concept of popular sovereignty. We saw in the previous section that the developing socio-economic contradictions were expressed in the political scene with the rise of the bourgeoisie and with the introduction of the universal concept of the people to stand for the concrete universality of the revolutionary subject, the bourgeoisie. It is at this stage in the evolution of government, according to Loughlin, that the ‘people’ first began to emerge as a political presence (Loughlin, 2003, p. 10).

It is claimed that ‘with democracy sovereignty was dispersed from the king’s body to all bodies; suddenly everybody bore political weight’ (Santner, 2011). One could argue, then, that the politico-theological concept of the King’s Two Bodies, translated in the concept of popular sovereignty, involves, in the place of the Body natural, the constituted separated powers of government (which themselves involve, as we already examined, a distinction between the physical persons and the offices), and, in the place of the Body politic, the constituent sovereign power of the people, latent in periods of normalcy, but ever present and ultimate arbiter of the way a polity governs itself. The idea that the Body natural is limited in its capacity by the Body politic is inherent in the concept of popular sovereignty.

One could even argue that one of the symbolic effects of the Regicide was the establishment of collective responsibility. The foundational murder makes the people ‘one’ and crowns them with the garments of sovereignty. This foundational act is then repeated each time the people appears as ‘one’, i.e. each time the popular will is expressed in the new institutionalised rituals of the liberal democratic state. Such a reading would be influenced by the Freudian analysis of the symbolic effect of the foundational act in the establishing of collective responsibility (Freud, 2011) and Rene Girard’s reading of the King-Christ as scapegoat whose foundational murder makes the people ‘one’, by establishing collective responsibility, and is repeated in the ritual of elections (Girard, 1986). Grasping the functioning of the ideological mechanisms at work for the ‘people’ to assume responsibility by appearing as ‘one’ in practices and rituals of the liberal democratic state is crucial for the analysis of the process of both establishing and reproducing a regime of power, property and productive relations.

Of course the ideological effect of the Regicide varies on the basis of developing socio-economic contradictions whose intensification was expressed in different forms in the social revolutions of the 17<sup>th</sup> and 18<sup>th</sup> century. For instance, in France the killing of the King coincided with the establishment of popular sovereignty, the abolition of the privileges of the aristocracy and the clergy. *Laos*<sup>12</sup>, the people, the laymen separated from the clergy, became the source of authority. On the contrary, in England the sovereignty of the monarch is replaced by the sovereignty of Parliament which expresses the combined will of the ‘three Estates’, i.e. King, Lords and

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<sup>12</sup> The concept of *laos*, i.e. the Greek term for the word ‘people’, is another evidence of the politico-theological shift in modernity. *Laos* initially refers to the laymen as separated from the clergy, but then assumes a more general meaning to signify the ‘people’ at large. Erik Peterson argues that the *laos* of the Christian *ekklesia* is the successor of the ancient *demos* (Peterson, 2011, p. 197). In fact the concept of *laos* concludes a cycle of transferral of concepts which starts with the concept of *ekklesia*. In the same manner that the concept of *ekklesia*, which is familiar to us as an institution of the polis, was adopted by the Christian Church to designate the ‘the assembly of fully enfranchised citizens of the heavenly city’, the concept of *laos* came to designate the citizens of the modern state.

Commons. The dialectics of rupture and continuity is much more subtle in the English context<sup>13</sup> and explanation for this can be sought in the comparative analysis of class struggle and the dissolution of the feudal relations of production in England and France. In particular, the development of agrarian capitalist which in the English context could better accompany a compromise between the lords and the rising bourgeoisie (Hilton, Sweezy, & Dobb, 1978), (Aston, Philpin, & Brenner, 1985), (Wood E. M., 1998).

So, after the 18<sup>th</sup> century it is the people that assume the garments of sovereignty (Douzinas, 2007). This is reflected in the foundational documents which resulted from the two revolutions, with the ‘people’ as source of the American and the ‘general will’ as source of the French new regime. Individual will and general will, man and the people, are the pillars on which the 1789 documents, i.e. the French ‘Declaration of the Rights of Man and Citizen’ and the U.S. Constitution, were based. The legal form, and the form of exercise of public power in particular, is revealed in these documents as the expression of the general will, i.e. the will of the people. We find this in the Preamble of the U.S. Constitution, with the famous ‘We, the People...’, and in Article 6 of the French Declaration of the Rights of Man and Citizen, which states that ‘the law is the expression of the general will’.

In fact Abbé Sieyes, the main theorist of the general will and constituent power in the context of the French Revolution, saw the constitution as emanating from the constituent will of the nation. The relation between general will and legal form is the one in which the will of the bearer of constituent power is the law. The question subsequently arises: who is the bearer of constituent power? To this Sieyes would answer: the nation. But can the nation altogether decide on the fundamental legal form? It is obvious that the question of representation and representative institutions is crucial in this discussion. Thus, for Sieyes, the will of the extraordinary

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<sup>13</sup> In fact, according to Blackstone, ‘the constitution of England had arrived to its full vigour, and the true balance between liberty and prerogative was happily established by law, in the reign of Charles the second’ (Poole, 2015, pp. 102-103); in the same spirit, according to J. G. A. Pocock, ‘the Revolution was more like a ‘second Restoration’ than a genuine revolution, a re-stabilization, of the conditions under which crown, parliament and national church could co-exist’ (Poole, 2015, pp. 102-103). The constitution was rebranded as the ‘balanced’ constitution and political actors worked hard to ensure that there had been no caesura in constitutional time, no moment in which the English state could self-consciously be made anew by its people (Poole, 2015, pp. 102, 103, 104). However, for all its conservative elements the post-Revolution settlement accommodated the changes in the socio-economic sphere, as evidenced in the replacement of ‘Tory’ policies favouring land by a ‘Whig’ approach that supported manufacturing or in the major fiscal reforms modelled on Dutch financial practice. The creation of the Bank of England in 1694, the radical increase in taxation, the creation of a (long-term) national debt on an unprecedented scale, and the growth of a sizeable public administration were developments which were facilitated by the constitutional settlement which resulted from the revolutionary upheavals of the 17<sup>th</sup> century and which laid the foundations of the expansion of British capitalism under the wing of the British ‘fiscal-military’ state, a state capable of fighting large wars and raising the resources needed to pay for them (Poole, 2015, pp. 104, 105, 107).

representatives, just as the will of the constituent power itself, is the source of constitutional law (Colón-Ríos, 2013, p. 85).

Therefore, for Sieyes, *representation is a necessity*. A contradiction can be identified here. For, on the one hand, constituent power as an absolute and unlimited faculty, radically unbound by the established constitutional forms, presupposes a fully present people, capable of expressing its will on the political form of its existence. The political form of the people's existence rests on the presence of the people themselves. However, the people can never be present, but must always be represented. Constituent power may be unlimited by any legal procedures, but 'the execution and formulation of the decisions of the constituent subject require certain organisation and procedures; otherwise the constituent subject would remain in a state of powerlessness and disorganisation, unable to transform its will into law' (Colón-Ríos, 2013, p. 87).

The argument can be turned on its head: the extra-ordinary representatives of a National Constituent Assembly may be the necessary bearers of constituent power, but in reality they speak in the name of a *fictitious people*. How are the people present, if representation is a necessity? If we accept that the people may only speak and may only act through its representatives, what is the analytical value of the interrelated concepts of general will, constituent power, and the people in interpreting historical and political events? Can it be argued instead that these are concepts legitimating the foundation, functioning and reproduction of a regime of power and property relations?

It is necessary at this point to refer to the relation between representational democracy and capitalism and make an argument for a dialectical analysis of liberal democratic institutions and concepts. For Carl Schmitt, democracy is a political form of existence of a people, which corresponds to the principle of identity (Schmitt, 2008, p. 255); but identity, in reality, means representation. We argue that this contradiction can be explained if we understand democracy as a state form corresponding to a class-divided society; a state form corresponds to specific socio-economic conditions, and is susceptible to change depending on the level of intensification of the contradictory nature of these conditions. Democracy is a state form, but the state is an apparatus whose function is central for the reproduction of the productive relations.

Therefore, a dialectical analysis of the foundational concepts and principles of the liberal democratic state, such as democracy and popular sovereignty, has to take into account at least two other kinds of relations, apart from the one between majority and minority: the one between rulers and ruled, and the one between exploiting and exploited classes. Democracy is the rule of the demos, i.e. the rule of the people. But, the concept of rule remains meaningless unless it

involves the issue of actual rule and power (in both its political and economic aspects). The vital issue of who rules over the economy and how social agents relate to the forces of production cannot remain outside a holistic analysis of the democratic practices<sup>14</sup>.

In fact, Ellen Meiksins Wood argues that the tradition of liberal constitutional democracy and its historical landmarks, such as the Magna Carta and the Bill of Rights of 1688, were marked by the ascent of the propertied classes (Meiksins Wood, 2016, p. 204). The ‘people’ in the tradition of popular sovereignty, from which the modern conception of democracy derives, is not the demos but a privileged social stratum; class divisions between the ruling landlords and the subject peasants were constitutive of ‘popular sovereignty as it emerged in early modernity’ (Meiksins Wood, 2016, p. 205). Thus emerged the need for representative democratic institutions; a need that was evident in the U.S. context more than in the British one. For, whereas the English Great Rebellion was played out on the basis of absolute sovereignty of the King versus limited government, the economic and political realities in the colonies had foreclosed the option of an aristocracy of propertied citizens, since property had ‘irrevocably discarded its extra-economic ‘embellishments’, in an economy based on commodity exchange and purely ‘economic’ modes of appropriation’ (Meiksins Wood, 2016, p. 214).

Consequently, the Federalists, ‘facing an unprecedented task of preserving what they could of the division between mass and elite in the context of an increasingly democratic franchise and an increasingly active citizenry’, had to come up with a conception of the ‘people’ and ‘general interest’ that would sustain a propertied oligarchy with the electoral support of a popular multitude (Meiksins Wood, 2016, p. 214). Firstly, the idea of ‘actual representation of all classes of the people by people of each class’ was dismissed as utopian (Hamilton, 1987, p. 233). In fact, the class of merchants was seen as the more capable of expressing the ‘general interest’. Merchants are the natural representatives of all social classes (e.g. mechanics and manufacturers) of the community. Additionally, representative institutions are necessary for the expression of this ‘general interest’ so as ‘to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens’ (Hamilton, 1987, p. 126).

Representative institutions are to act as filter not for the expression of the ‘general will’ and the promotion of the ‘general interest’, but for the relinquishment and alienation of the power from

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<sup>14</sup> In modern political theory, democracy is associated with majority rule; but a dialectical analysis of democracy has to concretely examine if and how the rule of the majority becomes in essence the rule of the minoritarian exploiting class. For this a more accurate analysis is needed that the 1% of the ‘haves’ versus the 99% of the ‘have-nots’ distinction. In fact a class analysis is needed, which takes into account the post-World War II movement of capital and the development of productive relations

the people (Meiksins Wood, 2016, p. 216). It can be argued, however, that this mechanism of representation is already evident in the first words of the Constitution: 'We, the People'. The American Constitution presupposes a people, notwithstanding, or rather, more precisely, carefully helping conceal the existence of conflicting parties (a manifestation of the views of which is evident in the collection of essays known as the Federalist and Anti-Federalist Papers), as well as the existence of conflicting social interests regarding the form that the exercise of public power should assume after the American Revolution<sup>15</sup>.

It can, thus, be argued that in order to conceal these (and any other) social divisions, the concept of the people as basis of liberal constitutions is devoid of any social class content. According to Schmitt, the people is considered to be 'present' as a political entity only when engaged in acclamation and 'to the extent that it does not only appear as an organised interest group' (Schmitt, 2008, p. 272). So, as long as the people are not organised as an interest group, i.e. as long as they remain an amorphous mass which is 'present' in street demonstrations and public festivals, in theatres, on the running track, or in the stadium, the people are necessary. As long as the 'people' is a sum of individuals -according to the Thatcherite axiom by which only individuals exist in society, not social classes with distinct social interests- they provide a regime of power, property and productive relations with legitimacy.

The concept of the people, as an amorphous sum of private individuals devoid of any class content, came to prominence during the bourgeois revolutions, which were carried out in the name of the 'people'. The bourgeois revolutions marked the rise to power of the bourgeois class and facilitated the further development of capitalist property and productive relations, while perpetuating the fundamental schism within society, i.e. the class division necessary for the extraction of surplus product. As indispensable as it was for the rise to power of the bourgeoisie during the revolutions, the concept of the people serves an even more crucial function for the securing of the bourgeois rule and the reproduction of the capitalist productive and property relations.

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<sup>15</sup> For an analysis of these conflicting interests that influenced the American constitution-making process, see Charles A. Beard, *An Economic Interpretation of the US Constitution*, 1913. For an updated analysis of the same on the basis of modern methods of quantitative analysis, see Robert A. McGuire, *To Form A More Perfect Union: A New Economic Interpretation of the United States Constitution*, 2002. Briefly, this analysis examines the conflicting social interests and views of the Federalists, the founders who supported a strong, centralized government and favoured the Constitution, and the Anti-federalists, the opponents of the Constitution and supporters of a more decentralized government. The former were individuals whose primary economic interests were tied to personal property (mainly merchants, shippers, bankers, speculators, and private and public securities holders), while the latter were individuals whose primary economic interests were tied to real property (McGuire, 2001).

Popular sovereignty is the concept that ultimately legitimates the exercise of public power. But it is a split and equivocal concept. In the words of the counter-revolutionary Joseph De Maistre, who acknowledged in his day the emergence of this new subject in political theory and practice: 'It is said that the people are sovereign; but over whom? – Over themselves, apparently. The people are thus subject. There is something equivocal if not erroneous here, for the people which command are not the people which obey. [...] The people exercise their sovereignty by means of their representatives. [...] The people are the sovereign which cannot exercise their sovereignty' (De Maistre, 1971).

The fictitiousness of the concept and its paradoxical relation to representative institutions are evident in these remarks. The relationship between sovereign and subjects is equivocal since the people are sovereign through their representatives, and, as a result, they are also subject. It is in this manner that authority is generated for the bourgeois juridico-political superstructure. As Loughlin notes, authority is in reality a product of the character of the *political relationship* that exists between that institutional structure and the people. In this sense, the political order *-the sense of political unity of a people-* must precede the constitutional order understood as text (Loughlin, 2003). The source of authority of the modern juridico-political order is found in the political unity of the people which precedes the constitutional order.

### III. Private individuals, public power and the fiction of the social contract

The idea of the political unity of the people derives itself from the original social contract. The theory of the social contract itself was developed in early modernity. Its most prominent exponents were Locke and Hobbes, but its influence reverberates in Kant as well. According to Marcuse, this theory was formulated in response to the developing capitalist relations and the change in the mode of extraction of the surplus value through economic means. The capitalist power, property and productive relations are mediated through universal principles, such as freedom and equality. Furthermore, the bourgeois revolutions were carried out on the invocation of the faculty of Reason. Therefore, the coercion necessary to reproduce the exploitative relations could not be justified on grounds of a divine right.

Coercion cannot be brought from without anymore, but it has to assume the form of self-limitation. It has to mask itself in order to obfuscate the fundamental contradiction on which it rests. Immanuel Kant achieves this through the 'Idea' of the 'original contract', which rests on the mystifying function performed by the mechanism of the 'as if'. According to Marcuse, the

content of the original contract centred on one point: on the universal mutual effort to make possible and secure 'peremptory' property. In this way 'the arbitrariness of empirical property turns into the regularity of intelligible property and appears as a postulate of practical reason' (Marcuse, 1936).

Kant establishes the right to individual property on two fictions<sup>16</sup>: one is the fiction of the 'original communal ownership', which we originally find in Locke<sup>17</sup>, and the other is the fiction of the 'general will'. The individual whether he has empirical property or not -a contingent matter in any case- has to comply with the established order, and has to act 'as if' he has given his consent, expressed in the general will, for his formal right to property -stemming from the original communal ownership- to be safeguarded. The authority which is necessary for the reproduction of capitalist property and productive relations rests on the aforementioned mystifications. So that freedom is possible only if taken away from all others, through mutual subordination.

These fictions, however, serve a very material purpose. Property, and the power that comes along with it, is the asset that may bring the rising bourgeois class in a position of superiority in relation to the feudal ruling class. And since for the feudal kings authority had divine origin and so did their property, in the new society the bourgeois class needed a different justification for the origin of their property and the authority emanating from it.

Bourgeois society is, for Kant, the society which safeguards *Mine and Thine* by means of public laws. Only in a bourgeois context can there be an external Mine and Thine, for only in this context do public laws 'accompanied by power' guarantee to 'everyone his own'. [...] Bourgeois society essentially achieves this legally secure position for the Mine and the Thine in its capacity as '*legal order*'; indeed, it is regarded as the ultimate purpose of all public right' to ensure the peremptory security of the Mine and Thine (Marcuse, 1936, p. 38).

Consequently, Kant's original contract reveals not only another instance of reification of authority, but also the main ideological elements-categories that constitute the fundamental fiction of the social contract: the private, *possessive individual* as the basis; and *public power* as

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<sup>16</sup> Kant arrives at the idea of an original joint ownership of the land and on the basis of this collectivity a collective general will can be established which legally empowers every individual to have private property (Marcuse, 1936, p. 42).

<sup>17</sup> 'It is very clear, that God, as King David says, Psal. cvx. 16, 'has given the earth to the children of men;' given it to mankind in common. But this being supposed, it seems to some a very great difficulty how any one should ever come to have a property in anything' (Locke, 1960, p. 286).



abstract expression of general will which safeguards the person and property of this one-sided individual. Consequently, with the social contract the source of authority is transformed to reflect the shift from feudal to bourgeois society. Authority is still based on a fundamental mystification. The fundamental mystification, which this time assumes the fiction of the original contract, is still a necessity. What changes is the source of legitimation of this authority. The religious form ceases to be the dominant one in the superstructure and gives its place to the legal form, through this move from one form of 'as if' to another<sup>18</sup>.

The need for a different source of legitimacy led to the development in early modernity of political theories which could provide a moral basis for a class state from postulates of equal individual natural rights. Kant's theory of the social contract was ultimately based on the seventeenth-century social contract theories and their individualist natural rights assumptions. Grasping the social source of these assumptions is crucial for analysing the dualistic form of public law. In order to do so, one has to look at the two major exponents of the social contract theory, Thomas Hobbes and John Locke, the work of whom manifests the way in which elements of legal ideology come to replace religious ideological elements in the dominant role of providing legitimation for a state-qua-objective-legal-order and consequently a property regime.

The starting point for both Hobbes's and Locke's political analysis is the individual<sup>19</sup> (in the same manner that the individual in the model of Robinson Crusoe is the model for any analysis of classical political economy) and not the social phenomenon in its totality (i.e. the historical development of political forms, determined by the socio-economic motion of change, but also acting themselves as factors and facilitators of change). What is more, this individual is a possessive individual, and his image is built upon principles both Christian and utilitarian, which reflect a certain kind of society, namely English society of the transitional period.

First of all, the characteristics of the individual are shaped by the understanding that human nature is corrupt. The basic selfishness of man, due to the Original Sin, must be accepted as part of the order of things. Politics results from human corruption; government would, in fact, be unnecessary were it not for the selfishness and irrationality of man (Wood, 1983, p. 37). This is because, apart from the Christian idea of corrupt and selfish nature, the individual is shaped by

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<sup>18</sup> As Marcuse notes: 'For Luther, divinely ordained authority was a given fact; in Kant the statement 'All authority is from God' only means we must conceive of authority 'as if' it did not come from men, 'but none the less must have come from a supreme and infallible legislator'. Correspondingly, the idea of a 'general will' only requires that every citizen be regarded 'as if' his individual will is included in the general will' (Marcuse, 1936, p. 40).

<sup>19</sup> It has been argued that even the utilitarian doctrine which seemed to supersede them in the eighteenth and nineteenth centuries is at bottom only a restatement of the individualist principles which were worked out in the seventeenth century: Bentham built on Hobbes (Macpherson, 2010, p. 2).

the more enlightened and utilitarian idea of a rational individual, promoting his self-interest, and putting his reason in proper use<sup>20</sup>.

This characteristic is evident in both Hobbes's and Locke's conception, and is elevated to the level of a natural law. Locke's human ideal delineated in the 'Essay Concerning Human Understanding' is concerned with the pursuit of happiness; naturally, men desire pleasure and attempt to avoid pain (Wood, 1983, p. 143). Hobbes's natural individualism is evident in his conclusion that 'of the voluntary acts of every man, the object is some good to himself' (Hobbes, 1996, p. 88). Hobbes's quintessential law of nature is the law of self-preservation<sup>21</sup> which necessarily leads to the social contract. But this also stands for Locke. Locke's natural state, where added emphasis is placed on the principle and institution of property, is 'a state of perfect freedom to order their actions and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature'; and it is also a state of equality (Locke, 1960, p. 269).

The contradiction between men being equal and free without subordination in the state of nature, and the necessity of subordination to a sovereign, is resolved by the introduction of a state of war. In the fiction of the social contract, the natural state is a state of war which leads to the fundamental law of self-preservation, based as it is on the individualistic premise of security of person and property, kicking in. For Locke, self-preservation, i.e. *security of person and security of property* means freedom from absolute power<sup>22</sup>. He argues that security of person and property of the individual is the *raison d'être* of the state as an objective legal order: 'to avoid this state of war is one great reason of men's putting themselves into society, and quitting the state of nature'

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<sup>20</sup> This utilitarian rationalism as the constitutive element of Locke's possessive individualism is mostly evident in his analysis of property. We saw above that Locke's starting point is the Christian myth of original common ownership. How then, asks Locke, does property arise? His answer is based on two premises: on the one hand, God gave land in common, but He also gave reason to man so as to utilise land (rational utilitarianism); on the other hand, Individual Man has property in his own person (possessive individualism). As owner of his own labour power, whatever he removes 'out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property (Locke, 1960, pp. 287-288). Of course Locke's analysis of property is replete with ideological elements whose function is to sanction the developing capitalist relations of property, by legitimating the enclosures of common land ('God gave nature to man in common but he gave it for man to make proper use') and the accumulation of property (God has given nature to us to enjoy as much as anyone can make use of to any advantage of life before it spoils; but this natural law does not hold after the invention of money which never spoils: 'gold and silver do not spoil; a man may therefore rightfully accumulate unlimited amounts of it' (Macpherson, 2010, p. 204).

<sup>21</sup> 'A law of nature, *lex naturalis*, is a precept, or general rule, found out by reason, by which a man is forbidden to do that which is destructive of his life, or taketh away the means of preserving the same, and to omit that by which he thinketh it may be best preserved' (Hobbes, 1996, p. 86).

<sup>22</sup> 'To be free from such force is the only *security of my preservation*; and reason bids me look on him as an enemy to my preservation, who would take away that freedom which is the fence to it; so that he who makes an attempt to enslave me, thereby puts himself into a state of war with me [...] This makes it lawful for a man to kill a thief, who has not in the least hurt him, nor declared any design upon his life' (Locke, 1960, p. 279).

(Locke, 1960, p. 282). This argument is originally found in Hobbes<sup>23</sup>, for whom the impossibility of securing one's person, on the one hand, and commodious living on the other, is the reason for the contracting out of individual natural rights to a sovereign who guarantees the enjoyment of these rights, albeit in a different form: in the form of civil and political rights enjoyed by legal subjects.

On the basis of the abstract, one-sided individual, examined in a metaphysical way, i.e. in his 'natural state', abstracted from the totality of the historical development of social formations, the theorists of the social contract deduced the fundamental obligation to a sovereign, i.e. the necessity of an objective legal order within which legal subjects enjoy their civil and political rights. The only way to secure the individuals' person and property is by conferring 'all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, *unto one will*' (Hobbes, 1996, p. 114).

Whenever therefore any number of men are so united into one society, as to quit everyone his executive power of the law of nature, and to resign it to the public, there and there only is a political or civil society. And this is done, wherever any number of men, in the state of nature, enters into society to make one people, one body politic, under one supreme government; or else when any one joins himself to, and incorporates with any government already made (Locke, 1960, p. 325).

We reach here a nodal point of the theories of sanctioning and legitimating the developing property and productive relations. The individual sovereignty inherent in the natural rights of freedom and property is replaced by the sovereignty of a state which safeguards the civil rights of freedom and property of the legal subject. In spite of the evident influence of the politico-theological doctrine of the 'King's Two Bodies'<sup>24</sup>, it is clear that the necessity of sanctioning the developing and seemingly arbitrary social relations and ensuring their reproduction has led to the development of the dualistic legal form of legitimation: the idea that the objective legal order is based on the existence of a subjective law which is presupposed. Subjective and objective law, liberal state and total state lie together at the origin of the bourgeois superstructure and ideology.

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<sup>23</sup> 'Hereby it is manifest that during the time men live *without a common power* to keep them all in awe, they are in that condition which is called *war*; and such a war as is of every man against every man. [...] The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law [...]. It is consequent also to the same condition that there be no propriety, no dominion, no mine and thine distinct; *but only that to be every man's that he can get, and for so long as he can keep it*' (Hobbes, 1996, pp. 84-85).

<sup>24</sup> It should be noted that not even 100 years separate the promulgation of the doctrine of the King's Two Bodies from Locke's and Hobbes's possessive individualist foundation of absolute monarchy.

On this basis, it can be argued that property, as the exemplary relation of the developing capitalist productive relations, appears as the socio-economic content of this dualistic form. The social relation of ownership is read back into the nature of the individual as proprietor and calculator of his own interests. It has been argued that what is reflected in Locke's political analysis were changes occurring in the social relations of production that were so essential for the development of capitalism, giving to the conception of man, society, and government a new and distinctive dimension (Wood, 1983, p. 47). Additionally, as far as Hobbes's analysis is concerned, it is argued that his theory of the social motion of man requires the assumption of a certain kind of society, described as the possessive market society, which requires a compulsive framework of law -i.e. objective legal order- and where life and property must be secured and contracts must be enforced (Macpherson, 2010, p. 58).

What is manifested in the above analysis is the general function of law in sanctioning and stabilising developing social relations, which at first may appear arbitrary. The purpose of the creation of an objective legal order is the security of the individual's natural rights and possessions; his freedom consists in protection of his property in his person and possessions. As a legal subject within a compulsive framework of law he can enjoy these rights. As we saw above, however, the natural rights of the social contract narrative -which are then turned into civil rights- reflect actual developing relations, such as the modern-capitalist relation of property, a relation freed from the hinges of feudalism hierarchy. As a result, it is the general function of law in sanctioning the developing social relations, as reflected in legal ideology, which explains why the property of the individual in his person and wealth is the foundation of the social contract, and why the preservation of this property necessarily leads to the creation of an objective legal order.

Herein, i.e. in the inviolability of property, lies the difference between Hobbes and Locke. On the one hand, Locke prioritises subjective law, i.e. the property right of the individual, in the ultimate case of a conflict with the objective legal order. 'The supreme power cannot take from any man part of his property without his own consent', because it would violate the very end for which it was created, which is the preservation of property (Locke, 1960, p. 360). Hobbes, on the other hand, prioritises the need for a centralised sovereign power, over any individual right and centrifugal force. In fact, 'the propriety which a subject hath in his lands consisteth in a right to exclude all other subjects from the use of them; and not to exclude their sovereign, be it an assembly or a monarch' (Hobbes, 1996, p. 165).

For Hobbes, centralisation must be favoured against fragmentation, because conflicting forces lead to civil war and are counted among the diseases of the commonwealth. This difference between Hobbes and Locke can be better understood if the primary goal of security and

reproduction of the bourgeois rule is considered. The State finds its legitimation in that it safeguards against competing individuals and their interests. In fact, it has been argued that 'the more nearly the society approximates a possessive market society, subject to centrifugal forces of opposed competitive self-interests, the more necessary a single centralised sovereign power becomes' (Macpherson, 2010, p. 95). Centralised power safeguards against centrifugal forces. This is the reason why Hobbes's individualistic postulates, which are the same as Locke's, lead to a different and more absolutist conclusion.

However, Hobbes's and Locke's conclusions are not incompatible; and this is precisely what Schmitt, in his analysis of the Leviathan, could not grasp: that the liberal state and the total state are two forms of the same content, sharing the primary goal of securing bourgeois relations, but responding to different social stimuli. Schmitt argues that Hobbes was in fact the founder not of the idea of autonomous politics but of liberal politics, by introducing a distinction between liberal and total state (Schmitt, 1996). The fundamental difference between the two, he argues, centred on the ability to distinguish the political sphere -that is, the state- from the non-political domain -that is, society. Schmitt insisted on the autonomy of the political and the de-politicization of society; the state must prohibit politically centrifugal forces from operating within its domain, and to do that it must prevent the societal sphere from becoming a political battleground (Schwab, 1996, p. xxxiv). The total state is there to secure (bourgeois) state rule by dealing with centrifugal forces, i.e. both intra-class antagonisms and class struggle.

For Schmitt, the Hobbesian state cannot be a 'total state', because the unconditional authority of the monarch (which is required in Schmitt's state of exception as well) is undermined by the privacy of belief and deliberation of the individual. Hobbes allowed the privacy of belief and Schmitt immediately recognised there the fracture where modern liberalism would crack. So, the free, equal, self-preserving and rational individual is the crack to which Schmitt refers to; however, as we have already seen, the same individual is the legitimating basis for the existence of the bourgeois state, in both its liberal and its total form. Schmitt's total state, as well as Hobbes's and Locke's, exist in order to secure this individual's property -i.e. in order to ensure the reproduction of the productive relations to which this abstract individual serves as a legitimating basis.

Consequently, the total state and the liberal state are not incompatible; both the total state and the liberal state are forms of the bourgeois state, corresponding to different stages of development of the capitalist relations of production, and different levels of intensification of socio-economic contradictions. The former, responding to conditions of intensified contradictions, prioritises the primary goal of securing the reproduction of the state and power regime, through 'emergency'

legislation; but, they both ensure the reproduction of the capitalist relations of production. Liberal state and total state are different forms of the same content. Liberalism and authoritarianism, the principle of the individual and the principle of the state power, are captured in the central dualism of public law which occupies the next section, namely objective law and subjective law.

#### IV. Subjective law and objective law

So far we have seen how in the concept of the 'Two Bodies' one can find in embryonic form the principle of limited government as well as the fiction of an undying body, the Body politic, which unites a class-divided social formation. This unity is reflected in both the concept of popular sovereignty and the theory of the social contract. However, this unity has its double in absolute fragmentation. For this political unity of the people is the sum of private individuals. This model is based on a dualistic presumption. On the one hand, the presumption of an individual and his natural rights which forms the legitimating basis of an objective legal order; and, on the other, that of an objective legal order mediating the exercise of legal rights of the individual, now turned into legal subject.

Public law is based on this dualism and functions to mediate the property and contract relations. The idea that the objective law of the legal order is based on the existence of a subjective law which is presupposed, introduces us to another dualism, which involves the distinction between subjective law and objective law. The examination of this dualism which permeates traditional legal theory will start by looking at the work of Hans Kelsen. The analysis of 'popular sovereignty' revealed a necessary link between legal subjectivity and legal subjection. The people are both subjected to the objective laws of the realm, but they are also sovereign, because it is the presupposition of their subjective rights existing outside the legal order which generates the authority of this objective legal order.

We saw how this idea links to the materiality of property, since it is the propertied subject that acts as the law's outside, as the possessor of legal rights. Now, let us examine this duality of objective law and subjective law -the dissolution of law into a norm and a power. This dualism is central in the debate of modern juridico-political theory, and it is this dualism that Kelsen tried to overcome in his pure theory of law. Pashukanis, writing in the same period as the two Western European writers, but in a different socio-economic context and from a different standpoint, examines the dualism of objective-subjective law which 'has a significance no less essential than the dichotomy of commodity into exchange-value and use-value' (Pashukanis, 1951).

Law is simultaneously a form of external authoritative regulation and a form of subjective private autonomy. The basic and essential characteristic of the former is unconditional obligation and external coercion, while freedom is ensured and recognized within definite boundaries. [...] On the one hand, law completely merges with external authority, and on the other it completely opposes every external authority not recognized by it. The duality of law as the synonym of official state power, and as the slogan of revolutionary struggle, is the arena for unlimited controversy and the most impossible confusion (Pashukanis, 1951).

For Pashukanis, the problem of the relation between objective and subjective law is the translation, in the field of the logical properties of law, of the problem that socio-historical analysis of law encounters as the problem of the relationship between legal and political superstructures. The starting question of this problem is whether a norm should be considered a prerequisite of a legal relationship (Pashukanis, 1951). Pashukanis' answer to this question sees the legal relationship of property as deriving from the social relationship of property which is primary. This line of argumentation is also followed by Warren Montag in his comparative analysis of Kelsen and Althusser in search for the 'law's outside'. Montag situates law's outside 'in the contradictory field of the *Rechtssubjekt*, traditionally understood, like Schmitt's sovereign, as both inside and outside the law, a figure whose liminality is constitutive of the legal order as such' (Montag, 2013). Let us look at the relevant passage from Kelsen's 'Pure Theory of Law' where he examines the function of the concept of legal subject and subjective law, in contradistinction to objective law.

Just as traditional theory places right ahead of obligation, so it regards the legal subject primarily as a *subject of rights* and only secondarily as a *subject of legal obligations*. In German legal theory, which distinguishes between law and right as between *objective law* and *subjective law*, the concept of legal subject -in German *Rechtssubjekt*- is closely connected with the concept of subjektives Recht (subjective law). The concept of *Rechtssubjekt* as the possessor or holder of a subjektives Recht is only another version of the concept of subjective law which is essentially formed with regard to the *concept of property right*. Just as in the concept of subjektives Recht so in the concept of *Rechtssubjekt* the idea predominates of an *entity different from, and independent of, the positive legal order* -the idea of the existence of a legal subject which is to be found, so to speak, in the individual and in certain corporate bodies whom the positive law must recognise as subjects of certain rights *in order to preserve its character as true law*. This view implies an *antagonism* between the law as an objectively valid order, a system of

binding norms (the objective law) and the subjective law (the right) as possessed by a subject; and this antagonism implies a *logical contradiction*. This contradiction manifests itself most clearly when the essence of being a legal subject is considered to be freedom, whereas the essence of the objective law is considered to be its binding force, even its coercive force, which is evidently the opposite of freedom (Kelsen, 1967, p. 170).

A series of important implications for the understanding of this central dualism of constitutional theory flows from the above passage. First of all, we see that this entire legal tradition to which Kelsen refers is based on a fundamental antagonism between right and obligation, subjectivity and subjection, subjective and objective law. A legal subject 'is a subject understood as the proprietor of rights, including the right to create or apply law, which makes the subject necessarily a subject of power. At the same time the legal subject, which is subject of obligations imposed upon other to secure its own right, is itself subject to obligations' (Montag, 2013). Second, this antagonism is resolved by prioritising subjective law over objective law. 'For this entire tradition of legal thought, subjective law, which for him primarily concerns the individuals as proprietors of both rights and things, takes precedence over objective law' (Montag, 2013). This is better understood if we remember the fiction of the original social contract, according to which the individual is an originally sovereign subject until by an act of free will it authorizes another to act in its place. In that sense the legal order exists for and by the means of the *Rechtssubjekt's* originary freedom.

Furthermore, Kelsen, in his analysis of the traditional jurisprudence and its emphasis on subjective law and its distinction from objective law, points towards the content that determines the dualistic (subjective and objective) form of law. It is the property relation which determines this dualism, according to Kelsen's critique. In the theories of legal subjectivity, the law's outside seems to correspond to the social relation of property, since the right of property seems to imply as its basis a *Rechtssubjekt*. As we saw above, once the order that guarantees the institution of private property is recognised as created by human will, and does not derive its legitimacy by the eternal will of God or by nature, the projection of a *Rechtssubjekt*, possessing the right to possess outside of this order and beyond its reach, becomes imperative (Montag, 2013). This is the result of what we referred to as the shift from the religious to the legal form as the dominant form of the bourgeois superstructure. Thus, the theories of the source of positive law's authority are designed to protect the institution of private property from being rescinded by the legal order (Kelsen, 1967, p. 171).

The *ideological function* of this self-contradictory conception of the legal subject as the holder of rights is easily seen: The function is to maintain the idea that the existence of



*the legal subject as the holder of a right* -and this means holder of a property right- is in a category that *transcends the objective law*, namely the positive law made by man and hence changeable by man; in other words, to maintain the idea that *property is an institution protected by a barrier insurmountable by the legal order* (Kelsen, 1967, p. 171).

For Kelsen, the *fictitiousness* of the concept of the subject of law is apparent, but nonetheless necessary (Kelsen, 1967, p. 170). This ideology, as Kelsen calls it, could not ground its appeals in the concept of property per se, but must point to the existence ‘in nature’ of the physical person, which precedes logically the legal order, and becomes the legal subject (Montag, 2013). However, Kelsen is critical towards this fiction of traditional legal theory. According to the ‘Pure Theory of Law’ law must be purified from politics; it has to stand as a normative order that can be accessed using scientific tools, like any other positive science. This is why the legal subject, so necessary for this ideology of law that Kelsen criticises, has to be eliminated on the basis of this constitutive fiction that sees this legal subject as a simple personification of norms. Let us see how Kelsen suggests resolving the fundamental contradiction between subjective and objective law:

According to traditional jurisprudence the law in the subjective sense and the law in the objective sense (i.e. the legal order as a system of norms) are distinguished as two different spheres. The Pure Theory of Law eliminates this dualism *by dissolving* the concept of ‘person’ as the personification of a complex of legal norms, *by reducing* obligation and subjective law (in the technical sense) to the legal norm which attaches a sanction to a certain behaviour and makes the execution of the sanction dependent on an action directed at this execution; that means: *by reducing* the so-called law in the subjective sense to the law in the objective sense. [...] The Pure Theory of Law eliminates the looking upon the law only from the point of view of party interest, i.e. from the point of view of what it means to the individual, whether it serves his interests or threatens him with an evil (Kelsen, 1967, p. 191).

Kelsen’s goal is to purify the positive (Pure) science of law from the ambiguity of political concepts, which are amenable to distortions determined by political expediencies. For this reason he tries to purify objective law from subjective law. His attempt at resolving the contradiction involves the reduction of subjective law to objective law, of the legal subject to an aggregate of norms. There is equivocation in the middle of this dualism as resolved by Kelsen; subjective law is identified with objective law, and nothing remains of the former. According to Panu Minkkinen, Kelsen wants to make a scientific analysis of sovereignty, beyond the ambiguity that

this concept carries with it due to its links to the political sphere. For this reason, Kelsen's sovereignty is reduced to the positivity of law and its conceptual purity (Minkkinen, 2011, p. 25).

In this norm that is supreme and that cannot be construed further, in the feature of sovereignty attributed to the juridical system that is, in its entirety, inferred from such an originary norm, lies the decisive moment of the positivity of law that gives law the quality of a self-sufficient, independent and closed system, distinct from all other normative systems (Hans Kelsen, *The Problem of Sovereignty and Theory of International Law* as quoted in (Minkkinen, 2011).

Kelsen insists that, from the point of view of a juridical science, state and law must by necessity be one and the same thing, 'because, to the extent that the state is an object of juridical knowledge [...] the state must by nature be juridical [...], and, further, because nothing but the law can be understood as 'juridical', the state *understood in a juridical way* [...] can only mean that the state must be conceived as law' (Minkkinen, 2011). For Kelsen, the apparent contradictions of the legal and the political superstructures, of law and the state, are resolved with the help of a *fictional personification* of the state into two distinct objects of knowledge: into both a system of objectively valid norms, and a subject normatively bound by the former. For Kelsen, to speak of the state as subjected to the juridical order, as the supreme authority that must, nevertheless, comply with the dictates of law, is but an insignificant 'systemic and aesthetic imperfection', a fiction that will enable theoretical elaboration of a state that seems to set itself duties. We simply think '*as if* even the state -as a legal subject with legal duties -were inferred from the juridical order' (Minkkinen, 2011, p. 18)

The function of the 'as if' betrays Kelsen's Kantian influence. In his 'Critique of Judgment', Kant suggests that empirical nature, together with its diverse laws, must be judged 'as if' it were a coherent unity (Lefebvre, 2008, p. 23). This is the function of the reflective judgment that seeks to find the universal when only the particular is given. For this quest to be able to take place the world has to be seen as a coherent whole. The mystifying and facilitating function of the 'as if' is borrowed by Kelsen, who requires law to be treated as a coherent whole -a requirement later to be found in Dworkin as well- and to be viewed *as* 'a self-sufficient, independent and closed system, distinct from all other normative systems'.

Thus, Kelsen's purified legal system is based on a fiction. According to this fiction, state is reduced to law, political power to a system of objectively valid norms. Parallel to this, subjective law is reduced to objective law. Or rather, the legal subject assumes a liminal position, both inside and outside the legal system. The subject as proprietor is included in the legal order by

being excluded from it. The fundamental ‘as if’, is that ‘the physical, juristic person who has obligations and rights as their holder *is* these obligations and rights -a complex of legal obligations and rights whose totality is expressed figuratively in the concept of ‘person’ (Montag, 2013). Person is merely the personification of this totality’. The subject of law is thus included in the legal order through its exclusion.

The resolution of the antagonism between subjective and objective law is the central theme of the debate between Kelsen and Schmitt over the origin of the constitution, which revolved around the dualism norm-decision. The liminal position of being simultaneously inside and outside the legal order is exemplified in Schmitt’s decisionistic definition of sovereignty. We saw how Kelsen’s Pure Theory treats the constitutive decision as if it was subject to the norm, because it treats the legal subject that decides on the legal order as being nothing outside this legal order, being an aggregate of norms. Schmitt, on the other hand, does not preclude the existence of a ‘law’s outside’, but he sees this political decision as groundless, as irrational. The constitutive decision cannot be determined by anything factual or normative, it is undecidable and as such it can be included in the legal order through its exclusion. Whereas Kelsen suppresses ‘law’s outside’ after he has identified it, Schmitt mystifies it by presenting it as analogous to God’s creative power.

## V. Norm and Decision

The last part of this chapter focuses on the dualism of norm and decision as it appears in the debate between Hans Kelsen and Carl Schmitt. Kelsen’s self-referential normative system prioritises the element of the objective law. On the contrary, Schmitt’s equally self-referential system is based on a groundless and irrational decision. This decision is a phenomenon of will; it has no essence apart from its existence. The discussion of the social role of this groundless irrationalism will conclude this chapter and lead to the more thorough analysis of the concept of ‘individual and general will’ which follows in the third chapter of the thesis.

As we already saw, Kelsen placed himself entirely in the camp of legal positivism. His theory was a theory of the pure positive science of law, and, according to it, subjective law must be strictly subordinate to objective law. The epistemological premise of this argument lies on the principle that no *ought* can be derived from an *is*. But, if it is the case that no ought can be derived from an *is*, then the only source of a norm can be another norm. Law, according to Kelsen, is its own complete system of normativity, a kind of free-floating system of ought (Kahn, 2012, p. 68). If no ought can derive from an *is*, and law is a system of normativity, we have to see

law 'as if' it was a self-sufficient, independent and closed system, distinct from all other normative systems.

For this reason, the basis for the validity of a norm can only be a norm. This is achieved by assuming the existence of a Grundnorm, a single highest norm from which the whole derives. We know that it must exist because this is a 'transcendental condition of the law that we do experience; the Grundnorm is the point that provides the normativity of the Constitution, for example' (Kahn, 2012, p. 69). We saw in the previous section how, according to this scheme, subjective law is reduced to objective law on the basis of this constitutive fiction. This means that the concept of the Grundnorm has the effect of identifying 'the state with its constitution, with the uniform basic norm' (Kahn, 2012). It is on these grounds that Schmitt accuses Kelsen of 'simply eliminating any place for a concept of the sovereign, if we mean by the sovereign a source of normative commands'. Kelsen, in turn, accuses Schmitt of 'reifying in the concept of the sovereign what is only a transcendental condition of judgment' (Kahn, 2012, p. 73).

For Schmitt, law -i.e. the legal order, the normative order of law- derives from a decision. His assessment in his 1928 'Constitutional Theory' of the legal order being the result of the decision-qua-exercise of the constitution-making power of a politically unified people, is already expressed in his 1922 'Political Theology'. The existence of the legal order presupposes the existence of a decision on the state of exception, a decision to suspend the legal order -even in its entirety- so as to preserve the very existence of the state-qua-legal order. The state, the political element of the superstructure, is prioritised in relation to law, the legal element of the superstructure. The bourgeois state remains; it is preserved through the state of exception even though the law is suspended, or precisely because the law is suspended. For there to be law, the sovereign decision on the exception is presupposed.

What characterises an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that *the state remains, whereas the law recedes*. [...] The existence of the state is undoubted proof of its superiority over the validity of the legal norm. [...] The state suspends the law in the exception on the basis of its right of self-preservation, as one would say (Schmitt, 2005, p. 12).

But, the decision is prioritised over the norm not only in relation to the sovereign decision on the exception, but also in relation to the judicial decision, whether coming from an ordinary court or coming from a constitutional court. Paul Kahn, in his analysis of Schmitt's decisionism, states that:

‘There is an essential connection between the decision that applies the legal norm and the decision for the exception; norms are constrained from above and below: they neither create nor apply themselves’. [...] A state must will itself into being (there must be order brought out of chaos) but it must also will its continued existence (there must be judgments) (Kahn, 2012, p. 65).

Schmitt believes that Kelsen’s view does not even explain the ordinary character of a legal system. The problem of the decision is already present whenever a legal conclusion is supported by an appeal to a superior norm (Kahn, 2012, p. 76). If law -according to Kelsen- is an autonomous, self-sufficient, independent and closed system, this system -according to Schmitt- is a nebulous sphere of indifference unless it is brought to concrete life through a sovereign decision and until it applies on concrete cases through the judicial decision. The decision determines the norm at both levels. According to Schmitt, the decision is the determinant term of this duality - even though the equivocation in the middle remains as we shall see. This is the meaning of Schmitt’s expression that ‘all law is situational law’. According to him, law is ‘not a system of norms derived from one another but the realisation of norms in the ordering of discrete situations’ (Kahn, 2012, p. 75).

The decision is not just at the border of law but fully penetrates the legal order [...]. [Politics] is not a domain of freedom only in the exception but at every moment. If so, the judicial judgment must be reconceived (Kahn, 2012, p. 62).

This decision, which penetrates the entire legal order, is also evidence of the ultimate groundlessness and undecidability. The decision is a phenomenon of will, not reason. As with every phenomenon of the will, it has no essence apart from its existence. (Kahn, 2012, pp. 40-41). For Schmitt, the decision, whether sovereign or judicial, contains an element of groundlessness, an element of irrationality. ‘Looked at normatively, the decision emanates from nothingness’ (Kahn, 2012, p. 32). The moment of the decision is madness. This quote, attributed to Kierkegaard by Jacques Derrida in his ‘Force of Law’, points towards the mystical foundations of authority. The first existentialist philosopher is also quoted in Schmitt’s ‘Political Theology’ in the last paragraph of the first chapter.

The exception explains the general and itself. And if one wants to study the general correctly, one only needs to look around for a true exception. [...] Endless talk about the general becomes boring; there are exceptions. If they cannot be explained, then the general also cannot be explained. The difficulty is usually not noticed because the general is not thought about with passion but with a comfortable superficiality. The exception, on

the other hand, thinks the general with intense passion (Kierkegaard as quoted in (Schmitt, 2005)).

What follows from the above is that the decision is an ‘*existential*’ concept, according to Kahn and Schmitt. It has no essence apart from its existence; it is a *phenomenon of the will*, but of a subjective will, which is not only separated from objective reality, but also mystifies its root in objective reality, material interests of social classes and their struggle. The political decision thus separated from objective reality has no anchoring in it. This groundlessness and irrationality of the form of the decision serves to obfuscate -in a multiplicity of narratives- the material content of a decision which is informed by a multiplicity of social, economic and political contradictions.

Schmitt’s decisionism echoes the mystical and irrational character of the medieval King’s authority. It can be argued that the doctrine of the Two Bodies reverberates in his political theology. During the transitional period from feudalism to capitalism the will of the king was the site of ultimate meaning in the state. ‘Before there could be any law at all, there had to be the king’s body as the mystical corpus of the state. [...] Existence before justice’ (Kahn, 2012). In the same manner, a groundless decision (either in its constitution-making or in its exceptional form) is the presupposition of any legal order, for Schmitt.

A question arises necessarily at this point: *Is Schmitt’s political theology a regression towards ideological elements dominant in a feudal social formation? And if so, what is the reason for this regression?* Schmitt’s irrationalism as the mystical foundation of authority is accepted by the post-structuralist tradition -Derrida in his aforementioned essay refers to ‘the just decision that must rend time and defy the dialectics’ (Derrida, 1992)- and is used to counter liberal rationalism. Reason and deliberation can be left to the liberal theorists, because reason can lead us astray even though it claims normative validity. According to Kahn, Schmitt’s irrationalism goes against Kelsen’s scientific positivism. The norm-decision dualism is based on the antithesis between reason and will.

We argue that Schmitt’s irrationalism is no irrationalism at all. His decisionism is not a groundless decisionism. This point will become clearer when we deal with a key text in understanding Schmitt’s theory of sovereignty and the exception, his 1933 ‘State, Movement, People’, and the change and continuity in his concepts. For the moment it is pertinent to refer to Schmitt’s relation to the theorists of the counter-revolution, which is manifested in the last chapter of the Political Theology and their anti-rationalism. The traditionalist and irrationalist theory of the counter-revolution views the state in isolation from its actual basis.

Furthering Hegel's transcendental elevation and irrational foundation of the State, the counter-revolutionaries claim that the institutions of society and the state are not anymore founded on rational will but they appear as divine institutions. The existing system of domination is thus elevated 'above any possibility of justification vis-a-vis the needs of individuals'. The separation of office and person is also abandoned by those naturalist and personalist justifications of authority. 'Government becomes a charisma which is given by God to the current governing person as such and this charisma radiates out from the person of the ruler to the whole political and social order which culminates in him' (Marcuse, 1936). But why this regression to such forms of legitimation that correspond to earlier societal formations, one would ask. Marcuse's analysis is enlightening on this point:

The theory of the counter-revolution initially fought for the feudal and clerical groups against the bourgeoisie as bearer of the revolution. In its long history it undergoes a decisive change of function: it is ultimately adapted for use by the ruling strata of the bourgeoisie. [...]The change of function of the theory accompanies the change in the history of the bourgeoisie from the struggle of a rising class against the remnants of a social organisation which has become a fetter on it, to the absolute domination of a few privileged strata against the onslaught of all progressive forces (Marcuse, 1936).

This shift is evident in Schmitt's theoretical apparatus and its objective function in the legal ideological state apparatus. The theory of the counter-revolution that served the feudal and clerical groups against the bourgeoisie, now serves the bourgeoisie itself in its struggle against the working-class movement during periods of intensified social and economic antagonism. It is only logical that Schmitt would re-visit these thinkers, writing in the context of working-class revolutions of the early 20<sup>th</sup> century. For this reason, his political theology shares the characteristics of irrationality and traditionalism of the counter-revolutionaries. The first characteristic that prefigures Schmitt's Political Theology is the tautology of sovereignty. Sovereign is he who decides on the exception. Metaphysical thinking is manifest in this self-referential structure, which eternalises the issue of sovereignty and confines it into the fragmented and mystical juridico-political sphere. Who decides on the exception? The sovereign. 'Sovereignty is unconditionally valid, independently of its performance, its suitability, or its success' (Marcuse, 1936). The second characteristic is the resort to the anthropological argument, and what we have termed as the ontology of conflict. 'Anthropology underlies the theory of counter-revolution as its most essential counter-part':

Man, in his quality of being at once moral and corrupted, pure in his understanding and perverse in his wishes, must necessarily be subject to government (Joseph de Maistre, *Oeuvres complètes*, Lyon, 1891-2, as quoted in (Marcuse, 1936)).

Sovereignty, thus, is congenital with human society because of man's evil nature. There is no society without sovereignty, without a symbolic surplus value added to those who are in the position to govern. State and Law are necessary in every human because of man's deprived nature. It is evident that this position rests on anthropological assumptions and can only be countered by a historical materialist view of society and the institution of the state. According to this reading the state is not congenital with society, but develops as soon as society is divided in classes due to the appearance of surplus in production and the subsequent institutionalisation of private property. It is logical that theories opposing this materialist conception would rely on an a-historical view of the state, and a metaphysical conception of human nature.

According to Marcuse, anti-rationalism is consciously wielded as an instrument in the class struggle, as an effective means of domination over the mass (Marcuse, 1936). This anti-rationalism has the effect of reification of authority. Law's function in a social formation is obfuscated, because its authority is reified along with the state's authority. The constitution can never be the work of man. Its authority is divine. In Schmitt, the divine garments of the King are assumed by the fundamental notion of 'political unity' which serves as the mystical foundation of authority.

Every Constitution is a creation in the full meaning of the expression, and every creation goes beyond the powers of man (Marcuse, 1936).

This is a fine example of the value added to the product of man's labour, in the form of the transcendental origin of every creation. Man's teleological positing function, which according to Lukacs is evident in the labour process (Lukacs, 1980, pp. 1-7), cannot be the basis for the creation of institutions which are to sustain such irrational relations of exploitation. For this reason, what would rationally be considered as an institution created by man, is seen instead as an institution of divine origin, since everything created cannot have its source in man, but in the only Subject capable of teleological positing, God.

To put it briefly, the mass of the people has absolutely no part in any political creation. It only respects the government itself because the government is not its own work. The feeling is engraved deeply into its heart. It bends beneath the sovereign power because it feels that this is something sacred which it can neither create nor destroy. [...] This is why



it is of infinite importance, even in the free states, that the men who govern should be separated from the mass of the people by the personal factor which results from birth and *wealth* (Marcuse, 1936).

The function of the irrationalist theory of authority is the divine and natural sanction of a regime of power, property and productive relations. According to the irrationalist elevation of the state above society, the mass of the people respects the government because the government is not its own work. This position seems to *prima facie* contradict the rationalist liberal democratic conception of the state and law. The mass of the people respect the government because they believe that it is *their own work*. This *prima facie* contradiction between Schmitt's thought and liberalism is also argued by Paul Kahn, who finds Schmitt's famous statement that 'sovereign is he who decides on the exception' as the mirror image of the political theory of liberalism:

Not law but exception; not judge, but sovereign; not reason, but decision. The inversion is so extreme that we might think of political theology as the dialectical negation of liberal political theory (Kahn, 2012, p. 31).

This *prima facie* contradiction between Schmitt's political theology and liberal political theory will be challenged in the next chapters. In fact, it will be challenged alongside other *prima facie* contradictions, namely between the 'rule of law' and the 'state of exception' and between the 'liberal Rechtsstaat' and the 'authoritarian state'. With the analysis of the dualistic form as basis we will proceed to examine the difference between the normal and the exceptional form and discover the unity underlying these forms. The hypothesis is that these forms, albeit different and corresponding to different levels of intensification of socio-economic contradictions, ultimately objectively function to reproduce a regime of power, property and productive relations.

This hypothesis will be investigated by furthering the analysis of the internal coherence and unity of concepts of public law. Our analysis so far started from the doctrine of the 'King's Two Bodies' and continued with a series of fictitious concepts, namely 'popular sovereignty' and 'social contract'. This led to the analysis of the dualistic form of public law. The dualisms of 'private individual and public power', 'objective law and subjective law', 'norm and decision', were analysed with a view to revealing the objective function of public law in reproducing a regime of power, property and productive relations. Before we look into concrete examples to substantiate this hypothesis we have to turn to concepts of general will and constituent power without which the analysis of the form of public law is incomplete.

## Chapter Three: General Will and Constituent Power

### I. Infallibility, responsibility and the general will

This chapter furthers the analysis of the internal coherence and unity of concepts of public law. In particular the concepts of ‘general will’ and ‘constituent power’ are analysed here as part of this unity of principles. The focus of this chapter remains on the internal aspect of the bidirectional analysis as set out in the first chapter, i.e. on the specificity of the function of principles central to the internal coherence and functioning of public law. As Poulantzas puts it, the relation between juridical norms and economic infrastructure is mediated through specific principles and values, which grant legal norms a wider validity.

It is under this prism that values and first principles of public law, such as ‘constituent power’ and ‘general will’, are analysed with a view to revealing their specific role of legitimating the exercise of public power and, thus, contributing to the reproduction of a regime of power, property and productive relations. In this light Schmitt’s famous statement that ‘all significant concepts of the modern theory of the state are secularized theological concepts’ has been revisited. To argue that all significant concepts of modern state theory are secularised theological concepts is to accept the transfer and mutation of principles from the theological discourse to the legal. These principles assume a different form in order to accommodate changes in the social and economic relations and the form of exercise of public power.

More specifically, this chapter begins with the analysis of the notion of ‘free will’, a notion central to the theology of the Western canon. Poulantzas himself sees the duly expressed will of the individual subject of law as the source of obligation. Onto this element-value of volition, already apparent in market societies preceding capitalist society, the new abstract values of formal liberty and equality have been grafted in modern law and the state, on the basis of the infrastructural realities of capitalist society (Poulantzas, 2008, p. 32). Rather than the private law aspect of this individualistic voluntarism, this chapter focuses on the public law counterpart of this individual will, i.e. the popular or general will.

The premise is then that free will is the source of another series of dualisms: individual and general will; private and public opinion. The modern theory of law is structured around the will of the legal subject and the general will of the people. Free will functions as the basis for property and contract -and the accompanying values of liberty, equality and security- as well as for the sovereignty of the people. In fact, Costas Douzinas locates a crucial aspect of the development of

modern political theory in the process of placing the individual will and its mirror-image, the sovereign will of the state, at the epicentre of the debate: ‘The sovereignty of unshackled will finds its perfect complement and mirror image in the sovereignty of the state’ (Douzinas, 2000, p. 20).

Our analysis is structured around a structural claim. Namely that the general will is a fiction which serves a legitimating purpose in modern liberal democratic regimes. This fiction is based on the idea of the free will; an idea that will be challenged by contesting the free nature of this will, but also its ‘generality’. The idea of the ‘freely informed, general will’ will be linked to the notion of public opinion. It will be argued that it is precisely the fragmented, isolated and *misinformed*<sup>25</sup> nature of this opinion which points towards the impossibility of existence of a truly ‘free and informed general will’ in a capitalist society. For this, the main characteristics of infallibility and responsibility, which accompany the notion of ‘free will’, will be analysed with reference to a specific case of expression of the ‘general will’, namely the Greek referendum of July 2015.

To begin with, the notion of ‘general will’ carries with it the vestiges of infallibility associated with the notion of ‘divine will’. In fact, one could trace a particular genealogy moving from the axiom that ‘the will of God is always right’, to ‘the King can do no wrong’, and finally to ‘the will of people is always right’. In this manner, the general will of the people is understood as part of a political theology which, as we examined in the previous chapter, serves to reify the authority of the earthly ruler on the basis of divine authority. Of course, the move from feudal to bourgeois forms of legitimating the exercise of public power meant that the infallibility of the general will has to be associated with rational thought and reason itself. The following passage from Carl Schmitt’s ‘Dictatorship’ illustrates this point.

Volonté générale is the essential concept in Rousseau’s philosophical construction of the state. It is the will of the sovereign and it constitutes the state as a unity. In this respect it displays a *conceptual quality that distinguishes it from any particular individual will*. In collective will, what is always coincides with what should rightfully be. Just as power and right are unified in God and, according to the concept of God, whatever he wills is always good and the good is always his true will, so too the sovereign -la volonté générale- appears in Rousseau as something that, through its mere existence, is always just what it

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<sup>25</sup> Misinformation is here used as a notion which enables the interrogation of the role of Ideological State Apparatuses and the new social media in influencing the formation of public opinion through the misinformation of the private opinions comprising the former. As such it contributes to the critique of the concept of general will by expanding the analysis to the structural formation of public opinion and its relation to State Ideology. See next footnote.

must be. *The volonté générale is always 'right'; it cannot err; and it is reason itself*, in relation to which natural law governs the physical world. It is imperishable, unchangeable and pure (Schmitt, 2013, p. 101).

There are two points of Schmitt's cited passage which are useful for our analysis: first that the general will cannot err and it is reason itself; and second, that the general will is qualitatively different from any particular individual will. These two characteristics of the *volonté générale* will be challenged. The first on the basis of the 'free will's' association with the mechanism of responsibility and the second through an analysis of the relation of general will to public and private opinion. Let us begin with the first.

The link between the concept of 'general will' and the idea of the body politic is most evident in Rousseau's 'Social Contract'. In the same manner as the English jurists of the 16<sup>th</sup> century, Rousseau uses the image of the human body to speak of the social body as possessing a single will which always tends to the well-being of the whole: 'the political body is also a moral being which has a will; and this general will, which tends always to the conservation and well-being of the whole and of each part of it, and which is the source of laws, is, for all members of the state and in relation to it and them, the rule of what is just or unjust' (Rousseau, 1993, p. 7).

That the general will is the will of the body politic which always tends to the well-being of the whole is guaranteed by its infallible nature. For Rousseau, the general will is always in the right, and always tends to the public welfare. But there is a difference between the will of everyone and the general will (Rousseau, 1993, p. 66). The decisions made by the people do not always have equal rightness because one may always desire one's own good, but one does not always see what it is (Rousseau, 1993, p. 66). The people sometimes err, so the exclusive competence to decide the particular means of promoting the general interest belongs to the ruler. Rousseau's concept of the general will is based on a distinction between the abstract idea of promoting the general interest and the concrete means to achieve this. The general will always tends to public welfare, but it is left up to the government to deal with the particular ways to achieve this welfare. Consequently, the role of the general will is to answer the question of the source of authority and to secure the legitimate exercise of public power.

According to Rousseau, the 'people' is often mistaken over what will be good for it, because particular interests might mislead it. In such cases the collective decision does not coincide with the general will (Rousseau, 1993, p. 8). What are then the conditions for the expression of the general will –one may ask? What is the relation between the general will and the verdict of the people as it appears in elections, democratic practices and representative institutions? Is it

possible for the general will to ever be expressed in a class-divided society? These are questions which we seek to address in the process of critically examining this concept. Let us see Rousseau's answer to these:

If, *when properly informed*, the people were to come to its decisions without any communication between its members, the general will would always emerge from the large number of small differences, and the decision would always be good (Rousseau, 1993, p. 66).

Rousseau's idea of the general will rests on the assumption of the proper information and free and isolated expression of the individual will. If the general will is to be properly ascertained, there should be no partial society within the state, and each citizen should decide according to his own opinion (Rousseau, 1993, p. 67). The point on the impossibility of proper information and free expression of the will of the individual in a class-divided society, due to the link between public opinion and State Ideology, is discussed in the next section. For the moment let us focus on another aspect of this fictitious concept which is so fundamental for the legitimate exercise of public power: its free nature, which is a manifestation of its divine origin.

As mentioned above, the general will's role in a system of principles legitimating the exercise of public power comes to replace the divine will as the source of the authority of this regime. In that manner the general will shares the characteristic of infallibility of the divine will. However, the general will does not share the divine origin of the divine will. It is rather a will which stems from the free will of the individuals, albeit qualitatively different from the latter. The implications of the association of the general will with the free will of the individual shed new light on the notion of general will, by associating its infallibility with the mechanism of assuming responsibility.

More specifically, and to the extent that we accept Schmitt's statement that all significant concepts of the modern theory of the state are secularized theological concepts, this general will can be seen in its genealogical relation to the concept of 'free will' of the Christian discourse. The existence of free will in Christianity is crucial in order to establish the metaphysical freedom necessary for the existence of good and evil, reward and punishment: 'No action would be either a sin or a good deed if it were not performed by the will, and so both reward and punishment would be unjust if human beings had no free will' (Augustine, 1993, p. 30). St. Augustine directly links the free choice of the will to the idea of responsibility: 'So if I use my will to do something evil, whom can I hold responsible but myself' (Augustine, 1993, p. 72)?

On this basis it is argued that the general will must be understood as a mechanism for the people to assume responsibility for public decision-making, or rather as a mechanism to exculpate the ruler by transferring the responsibility to the ruled. In the same manner that the free will serves as the basis of responsibility in the Western canon, ever since Augustine and his establishment of free will as the presupposition of all good and evil in the world, the popular-general will in modern state theory functions as a mechanism for the 'people' to assume responsibility and absolve the 'sins' of the ruler.

This ideological mechanism is echoed, for instance, in a statement by Cornelius Castoriadis on the responsibility of a people -which resonates with the current predicament of Greece in a surprising manner: 'Can we say that all this was imposed on the Greek people in absentia? Can we say that the Greek people did not understand what it was doing, what it was voting, what it was tolerating? [...] If the Greek people are not responsible we should appoint them a guardian. I say that the Greek people -like every people- are responsible for their own history, consequently, responsible for its current state of affairs' (Castoriadis, 2000).

In the above statement the responsibility of the people is an Augustinian responsibility, based on the conception of free and equal subjects assuming full responsibility for their actions-choices-decisions. This responsibility, expressed in the principle of the 'free and general will', is the foundation of modern democracy. The free individual chooses in free elections his representatives and in this process the general will is expressed. The general will, the free will of the people, is the Pool of Siloam where the sins of the rulers are absolved. The ritual of collective responsibility, which is established when the people assume from the King the garments of sovereign, is repeated in the general elections and the plebiscites of the liberal democratic state. The responsibility associated with the notion of 'free will' becomes the collective responsibility associated with the notion of 'general will'.

## II. General will and public opinion

The infallibility of the general will is accompanied by the responsibility entailed by its free nature. This responsibility is assumed by the people because of the free nature of the will, i.e. because of the unmediated expression of the general will in elections and plebiscites. In reality, however, the idea of the free will of the voters hides the various mechanisms at work within society. It certainly obfuscates the effect of ideology (in the Althusserian sense of the term). Louis Althusser, in order to produce a theory of the state, introduced the concept of Ideological

State Apparatuses, alongside the concept of (Repressive) State Apparatus which comprises the government, administration, army, police, courts and prisons. The Ideological State Apparatuses (which include the religious apparatus, political apparatus, cultural apparatus, information and news apparatus, etc.) are systems of defined institutions, organisations and practices which realise different regions and forms of ideology, unified under the State Ideology, i.e. the ensemble of ideas, practices, and rituals which are realised in these apparatuses and which are essential for the reproduction of the capitalist relations of production (Althusser, 2014, pp. 75,77,177).

An analysis of political processes and decisions based on the free and informed consent of the individual and the public, as if it was formed in a vacuum, completely ignores the effect of the Ideological State Apparatuses, which inform practices and rituals throughout the social formation, in the formation -or *mis-information*- of this 'general' will. On the contrary, a Marxist analysis of the state and law has to take these mechanisms into account and assess critically the content and function of terms such as 'free and general will'. To do so, let us return to Carl Schmitt and examine the relation between the individualisation of general will and the privatisation of public opinion. In this way the second characteristic of the general will, i.e. its being qualitatively different from any particular individual will, will be challenged.

In his 'Constitutional Theory', Carl Schmitt raises the point that the secret individual vote is not a democratic but a liberal individualistic institution. The individual ballot being secret means that the voting state citizen is isolated in the decisive moment (Schmitt, 2008, p. 273). Therefore, in modern democracy the methods of the popular election and referendum do not give rise to the expression of the general will but to the private opinion of the private man. For Schmitt, the result of modern institutions for public decision-making is 'a sum of private opinions' (Schmitt, 2008, p. 274). This phenomenon he calls the privatisation of the public.

In order to understand the 'anti-democratic' effects of this phenomenon we have to refer to the role played by the concept of 'public opinion' in Schmitt's analysis of democracy. For Schmitt, democracy is designated as the rule of public opinion, 'government by public opinion'. Public opinion is the modern type of acclamation, the instance in political affairs where the people is 'present'. And the people can only be 'present' in the public. But 'no public opinion can arise by way of secret individual ballot and through the adding up of the opinions of isolated private people' (Schmitt, 2008, p. 275). Here the dialectics of *public and private* is at its most evident. If the public opinion is the modern type of acclamation but cannot be expressed in liberal democratic institutions, then perhaps we have to think of public opinion in a different manner.

Giorgio Agamben, in his 'The Kingdom and the Glory', analyses the structure of power in modern societies on the basis of the duality of concepts of 'oikonomia' and 'doxa': the former refers to the governing and administrating aspect of power, while the latter to the glorious and legitimating aspect of power. In this work Agamben credits Schmitt for identifying the link between acclamations and democracy, as well as that between acclamations and the public sphere. However, for Agamben the sphere of public opinion is the place where the sphere of glory, i.e. the glorious aspect of power, has shifted in modernity. Additionally, if one follows this line of reasoning, 'the problem of the political function of the media in contemporary society that is so widely debated today acquires a new meaning and a new urgency' (Agamben, 2011, p. 255).

Agamben's insight has diverse implications for our analysis. If the sphere of glory in modern democracies shifts to the sphere of public opinion and raises the issue of the political function of media in contemporary society, a point can be raised about the relation between public opinion and State Ideology (integral part of which are the first principles of law and politics, such as popular sovereignty). This relation is manifested in the glorious moments of modern democracy, when the people appears in all its glory to answer a question which is referred to it, only for the privatised public opinion as informed by the Ideological State Apparatuses to be expressed. Therefore, it can be argued that the glorious aspect of power does not escape State Ideology. Public opinion may appear 'uncontrolled', but the less controlled it remains and the more private it is and the better it reflects State Ideology.

A parallel can be drawn here between the doctrine of the 'King's Two bodies' and the public and the private body of the people. The above analysis reveals public opinion as the sum of private opinions. Therefore, the qualitative distinction between individual and general will appears based on the fiction of the separation of the public and the private body of each individual citizen. The concepts of general will and public opinion generate the fiction of a freely informed 'will of the people', which finds its unmediated expression in general elections and plebiscites. Contrariwise, in reality, private opinion is mediated through the Ideological State Apparatuses and public opinion is not of a different quality, but merely the summation of private individual wills and opinions.

Of course, the importance of public opinion and the control over it has been examined ever since the early modernity. An astute analysis of this we find in Hobbes's 'Behemoth'. For Hobbes, the ultimate source of political power lies in the ability to control public opinion: 'the power of the mighty hath no foundation but in the opinion and belief of the people' (Hobbes, 1990, p. 16). This is why Hobbes puts so much emphasis on the importance of both the temporal and the spiritual power being united in the office of the earthly Sovereign. Foreshadowing the relation between



public opinion and State Ideology, Hobbes identifies heresy with private opinion and posits that heresy bears the same relation to the power spiritual, ‘that rebellion doth the power temporal’ (Hobbes, 1990, p. 9).

The translation of the Bible into English in the 17<sup>th</sup> century allowed ‘every man, nay, every boy and wench that could read English’, to think that they spoke with God Almighty and that they have become judges of religions, and interpreter of the Scriptures to themselves (Hobbes, 1990, p. 21). The reverence and obedience to the spiritual power of the Church was compromised. So, the root of heresy and (spiritual and civil) disobedience is private opinion. Thus arises the importance of the earthly sovereign uniting both powers and controlling public opinion; for, it is only for the Parliament to declare heresy any new error that has not yet been declared heresy (Hobbes, 1990, p. 10). Hobbes’s account of the Great Rebellion posits an argument for the control of public opinion by the State.

On the basis of Hobbes’s analysis of the need of the State to control public opinion, and Althusser’s analysis of the functioning of the Ideological State Apparatuses to reproduce the capitalist relations of production, we put forth an argument on the refined ways of controlling public opinion and ensuring that its privatised expression is never contesting the status quo and is never threatening the reproduction of bourgeois rule. This is done precisely through the *fragmentation* of public opinion and through its *mis-information*. The general will, supposedly expressed in general elections and plebiscites, is never expressed. On the contrary, *misinformed* and isolated individualised opinions are expressed.

Of course to sustain such an argument it is necessary to research and analyse the problem of the political function not only of media, but also of the so-called ‘new social media’ in contemporary society. This endeavour falls outside the scope of our analysis, but a few initial remarks can be made. Surprisingly enough, it was Carl Schmitt who envisaged such a manner of privatising the public opinion back in 1926: *It is fully conceivable that one day through ingenious discoveries, every single person, without leaving his apartment, could continuously express his opinions on political questions through an apparatus and that all these opinions would automatically be registered by a central office, where one would only need to read them off* (Schmitt, 2008, p. 274).

No such central office exists, at least of public nature, but personal computers, the internet and the phenomenon of online campaigns leave a big digital footprint that can be analysed, often in real time, according to a recent special report of the Economist (Economist, 2016). Of course this access to data can -and in many cases has already- lead to a concentration of power to private

entities with the financial resources to be able to control these data. Evidently, economic power translates into political power through the digital media apparatus; and, as a result, economic power translates into the influencing of public opinion, i.e. the misinformation of its component private opinions. Thanks to social media, and with the aid of complex algorithms, these data allow campaigners to target individual voters with even more precision, by identifying who may be persuaded to vote for a particular candidate, and injecting tailored ads into their newsfeeds (Economist, 2016).

Furthermore, apart from targeting, there is another way of influencing the formation of private opinions through this form of big-data-enabled computational politics: the spread of misinformation. The spread of information in general on social media is typically ‘spiky’, with some posts suddenly becoming extremely popular whereas others never take off, regardless of the topic (Economist, 2016). According to a research conducted at the Indiana University, misinformation can spread widely, even if ‘users’ are programmed to prefer worthy content, when it coincides with information overload, which is common online (Economist, 2016)<sup>26</sup>.

The above analysis poses a challenge to the possibility of existence of a ‘free general will’ in contemporary societies. In fact it is argued that the idea of a general will, freely informed and expressed unmediated in elections, functions to dress in the garments of sovereignty the expression of a sum of individual opinions which are misinformed and dunked in ‘the stream’ of public opinion and State Ideology, i.e. in no position to contest the reproduction of bourgeois rule or the reproduction of the property regime and productive relations of capitalism. Let us now move to the analysis of the process of the Greek referendum of July 2015 in order to illustrate this theoretical point with reference to a particular case.

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<sup>26</sup> Reference can be made here to the case of Andrés Sepúlveda, who is now serving 10 years in prison for charges including use of malicious software, conspiracy to commit crime, violation of personal data, and espionage, related to hacking during Colombia’s 2014 presidential election (Robertson, Riley, & Willis, 2016). As a manifestation of how modern methods of control of public opinion involve its fragmentation and misinformation, Sepúlveda’s insight was to understand that voters trusted what they thought were spontaneous expressions of real people on social media more than they did experts on television and in newspapers (Robertson, Riley, & Willis, 2016). His team of hackers worked on presidential elections in Nicaragua, Panama, Honduras, El Salvador, Colombia, Mexico, Costa Rica, Guatemala, and Venezuela, rigging political campaigns, by stealing campaign strategies, manipulating social media to create false waves of enthusiasm and derision, and installing spyware in opposition offices (Robertson, Riley, & Willis, 2016). Their job was to do actions of dirty war and psychological operations, black propaganda, rumours: Sepúlveda wrote a software program, now called Social Media Predator, to manage and direct a virtual army of fake Twitter accounts so as to manipulate the public (Robertson, Riley, & Willis, 2016).

### III. A concrete case of expression of the general will

In Greece, article 44 paragraph 2 of the 1975 Constitution, as modified by the constitutional amendments of 1986 and 2008, allows the President of the Republic to call a referendum in either of two instances: either ‘on crucial national issues’ if supported by an absolute majority of the legislature on the proposal of the government; or ‘on already voted bills which regulate crucial social issues’ if supported by three fifths of the absolute number of MPs. On July 5<sup>th</sup> 2015 this provision was used for the first time, so the territory is uncharted in terms of precedent that would allow one to interpret this and other related provisions on the basis of previous interpretations. The executive brought its proposal for a referendum ‘on a crucial national issue’ to discussion in parliament on June 27.

The question that was referred back to the Greek people was the following: ‘Should the agreement plan submitted by the European Commission, the European Central Bank and the International Monetary Fund to the Eurogroup of 25 June 2015, and comprised of two parts which make up their joint proposal, be accepted?’ The question was followed by the titles of the two documents comprising the agreement plan: ‘The first document is titled ‘Reforms for the Completion of the Current Program and Beyond’ and the second ‘Preliminary Debt Sustainability Analysis’. This was the specific question that the Greek people had to respond to.

But behind the ‘yes’ or ‘no’ to the troika’s proposal there was a multiplicity of questions, rendering the content of the answer a relative one. In fact, the parliamentary debate of June 27<sup>th</sup>, on the executive’s proposal for a referendum, focused on the content of the question asked. Syriza’s, i.e. the governing party’s, MPs focused their interventions on clarifying that the question is: ‘not about ‘Euro or not’, ‘remaining in Europe or not’. We want to remain in Europe, but in a social Europe, a Europe of democracy. And we do not want the Europe of Neoliberalism and austerity’ (Katrougkalos, 2015, p. 3832). So, if one were to categorise this interpretation of the question ‘yes or no to the troika’s proposals’, he would conclude that its main tenets are ‘yes to Europe’, ‘yes to the Euro’, ‘no to Europe-as-it-is’, i.e. ‘no to austerity’<sup>27</sup>.

On the other hand, the interventions of the MPs of the opposing parties focused on the falseness of the question, asking why the government did not refer its own proposals for agreement with the troika to the people, and suggesting different interpretations of the ‘real content’ of the

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<sup>27</sup> A constitutionally problematic aspect with this interpretation is that the question is reduced to a question on fiscal issues, which would, in cases falling under the second kind of referendum provided by the Greek constitution, be unconstitutional. The ratio behind this is that asking the people for more or less austerity would be self-defeating the purpose of the referendum.

question. In particular, MPs of the parties of the former coalition government concentrated their criticisms on the falseness of the question: ‘The question is false. You do not have the courage to pose it together with the government’s proposals. It is false; because who wants taxes, who wants to lose rights (Venizelos, 2015, p. 3826)?’ Similarly: ‘The government tries to take advantage of the people’s discontent towards the unpleasant measures it has agreed upon [...]. Why don’t they bring their own proposals, to see if the people want them or not (Fortsakis, 2015, p. 3827)?’

Furthermore, a multiplicity of ‘yes’ and ‘no’s is put forth as underlying the ‘yes or no to the troika’s proposals’. Indicatively: ‘For today the real question of the referendum is not the one that the government misleadingly poses, but the true one, i.e. ‘Euro and Europe or drachma and banana-republic?’ The question for the Greek people [...] is whether they want to stay in the safe haven of Europe, their home, or whether they want to roam in unknown paths and try alternative solutions which are offered thoughtlessly, without ever becoming concrete’ (Lykoudis, 2015, p. 3841). In a similar manner: ‘The referendum in reality is a referendum for ‘yes’ or ‘no’ to the Euro. You hesitate to say it, but this is the additional legitimation sought from the Greek people’ (Mitsotakis, 2015, p. 3894). Additionally: ‘The referendum, beside the question ‘yes or no to Europe’, implies another question: ‘yes or no to the government’ (Voridis, 2015, p. 3836).

A *structural argument* can be raised on the basis of the observation of the leitmotifs of the parliamentary debate. First of all, the debate in parliament focused on ‘unearthing’ the real question behind the ‘false’ one posed by the executive. This resulted in a multiplicity of interpretations. The ‘yes or no to the proposals’ was interpreted as ‘yes or no to the Euro’, ‘yes or no to the EU’ and ‘yes or no to the current Greek government’. The diverse interpretations of the question would lead to an even more diverse set of possible answers: ‘yes’ to the EU, ‘yes’ to the Eurozone, ‘no’ to austerity, for those individuals who disagreed with austerity policies but believed that the Eurozone could be reformed; ‘no’ to the EU, ‘no’ to the Euro, ‘no’ to austerity, for those who locate the problem in the structure of the EU itself; ‘yes’ to the EU, ‘no’ to the Euro, ‘no’ to austerity, for those who believe the single currency is problematic but are not against European integration; ‘yes’ to the EU, ‘yes’ to the Euro, ‘yes’ to further reforms, ‘no’ to the current government, for those supporting the austerity policies and opposing the government’s declarations on policies tending to social justice.

What is more important is the objective effect this diversification has on the expression of the ‘general will’ on the issue of the referendum. The multiplicity of questions and answers shows the *general will as a multiplicity of individual wills*. The multiple interpretations (based on different narratives), enabled by the posing of the question, reveal the *general will as a summation of private individual wills and opinions*. This privatisation of the general will

exacerbates the utter dependence and furthers the distantiation of rulers and ruled, as the general will becomes the expression of the 'free' will of isolated individuals. Moreover, the 'free' nature of the will is itself challenged as the will expressed is formed within a disorienting context set by a question which is polarising and simultaneously obfuscating the internal differentiations of a 'no' vote.

In particular, despite the multiplicity of interpretations available by the way the question is posed, a 'no' vote, can mean nothing more but the rejection of the proposals of the troika. In this the governing party and the opposition parties are in agreement. There is no question of Greece's place in the Eurozone or the EU. In the words of the minister: 'Of course the big question is not if we stay or not in Europe. Of course we will stay. Why do they try to confuse the people? Who said that we do not want to stay in Europe or that we will not stay? [...] Who said that there is a question of 'Euro or drachma' (Katrougkalos, 2015, p. 3833)? In that manner the interpretation of a 'no' vote by the ruler is predetermined by the way the question is posed, and the government acts as the Katechon, holding back the Apocalypse, which would ensue an exit from the EU, by holding back what would be the real 'crucial national issue' for the people to decide.

This conclusion is further strengthened by the refusal of the executive to reformulate the question even though the debate in Parliament, as was shown above, focused on the issue of the question and this is provided for by the Standing Order of the Hellenic Parliament. In fact, Art. 115, paragraph 4, states: 'The vote for the acceptance or not of the Cabinet's proposal is by name and on the text of the proposal as submitted or formulated during the discussion in Parliament'. The term 'formulated during the discussion' points towards the Parliament's power in re-formulating the question posed by the executive, and consequently ameliorating the distance between rulers and ruled, between the executive and the people.

During the debate in Parliament and on the basis of the above provision there was a formal motion put forth by the several members of Parliament asking for the reformulation of the question to include two issues: on the one hand, the acceptance or rejection of both the proposals of the troika and the proposals of the Greek government during the negotiations for a new agreement; on the other hand, the issue of disengagement from the EU itself and the abolition of the Memoranda and the laws implementing them. The government in refusing to discuss the reformulation of the question, even though the debate centred on this issue, answered the question: 'quis judicabit?' Who will interpret? Who will decide? Who is the sovereign?

These questions, in the work of Carl Schmitt, have been associated with the figure of the Katechon. The Katechon appears in Schmitt's 'Political Theology II' and his 'Nomos of the

Earth' and is another secularised theological concept. In the theological discourse it appears in St. Pauls Second Epistle to the Thessalonians to denote the figure that holds back the Apocalypse. In an analogous manner, Schmitt uses this figure to highlight the opposition between *nomos* and *anomie*, state and order versus absolute chaos. The Katechon is the sovereign figure who has an invested interest in the reproduction of a regime of order, and is, therefore, an essential figure in answering the question 'quis iudicabit' in Schmitt's politico-theological context.

Analogously, in the case of the Greek referendum, one could argue that the executive acted as the sovereign, as the Katechon, who in never contesting Greece's place in the EU or the Euro, held back the apocalypse. This role was in fact the one assumed by the executive as manifested in the common statement of the leaders of parliamentary parties the day following the referendum. In the announcement of the President of the Hellenic Republic of 6<sup>th</sup> of July 2015, the leaders of all parliamentary parties interpreted the general will thus: 'The recent verdict of the Greek People does not constitute a mandate for rupture, but for the continuation and the intensification of the effort to achieve a socially just and economically sustainable agreement'.

As we saw above, there were multiple interpretations of the question based on multiple narratives. Each individual voter chooses the one he considers dominant and answers the question of the ballot based on this. This necessarily entails the individualisation of the 'general' will. Because of this fragmentation there can be no general will. This also explains the outcome of the referendum, and the turning of the 'no' vote into an agreement with worse measures than the ones rejected by the 'people'. This was not the result of 'capitulation' or 'betrayal', but a direct outcome of the way the question was posed. The 61% of votes rejecting the proposals of the troika was in reality a summation of 'individual wills' answering different questions. The polarising effect of the referendum cancelled the internal differentiation of a 'no' vote. A wide percentage among those who voted 'no' interpreted the question as a possibility of rupture with the EU. After all this interpretation was promoted by the 'yes' campaign, too.

#### IV. General will and popular sovereignty

To summarise the findings of this section, the general will, despite its apparent infallibility ('what the people will is always right') appears as a mechanism for the amorphous 'people' to assume responsibility and exculpate the actual decision-making authorities. It is argued that, through its unmediated expression in general elections and plebiscites, the general will assumes a different quality from the individual wills it consists of. However, the examination of the case of the Greek

referendum reveals the dependence of the 'general will' on the question posed by the ruler-executive; the interpretation of the verdict of the 'people' by the ruler-executive; the *misinformation* of the general will and public opinion. Of course, all the above all the more necessitate the appearance of the will expressed in a referendum or a general elections as 'general and free'. What the above analysis reveals as impossible -i.e. the existence of a general and freely informed will of the people- has to be rendered possible for the legitimate exercise of public power

Another structural point can be raised here with regards to the reason for having elections, holding referendums and encouraging the expression of the general will. This point concerns the relation between ruler and ruled. As we saw in the previous chapter, for Carl Schmitt, democracy is 'a state form that corresponds to the principle of identity' because 'democracy is the identity of ruler and ruled, governing and governed, commander and follower' (Schmitt, 2008, pp. 255, 264). It seems then that democratic institutions are to be preferred because they realise the identity of ruler and ruled. And the institution of referendum is the exemplary democratic institution. Schmitt claimed that 'if a matter is decided through a referendum, a so-called genuine plebiscite, and the question presented is answered 'yes' or 'no', the principle of identity is realised to the fullest' (Schmitt, 2008, pp. 240-241).

However, the supposed identity of ruler and ruled is certainly not a relation of non-representation, but one of utter dependence on the way the question is posed. Firstly, because, even in a plebiscite, the individual state citizen entitled to vote appears as a 'citoyen', not as a private man and private interest; he appears as a 'representative of the whole', not of his private interests. In the words of Schmitt: At no time or place is there thorough, absolute self-identity of the then present people as political unity. Every attempt to realize a pure or direct democracy must respect this boundary of democratic identity (Schmitt, 2008, pp. 240-241). According to Schmitt, elements of representation are unavoidable; even in direct democracy all active citizens are merely representing the people and the general interest. Hence, the principle of identity can never be realised to its fullest, not even in an acclamation.

Secondly, and more importantly, the identity of ruler and ruled is shattered by the utter dependence of the latter on the question posed by the former. According to Schmitt, plebiscitary legitimacy 'requires a government or some other authoritarian organ in which one can have confidence that it will pose the correct question in the proper way and not misuse the great power that lies in the posing of the question' (Schmitt, 2004, p. 90). This dependence on the posing of the question means that the substantive decision is already rendered by the manner of posing the question (Schmitt, 2008, p. 304).

In the case of the Greek referendum, the question posed predetermined the interpretation of the outcome of the vote by the ruler, an argument reinforced by the refusal of the executive to reformulate the question in the parliamentary debate. The question was specifically designed to allow multiple interpretations, central among which was the interpretation of the question as an opportunity of rupture; an interpretation, however, which, albeit allowed and encouraged, was rejected from the beginning by the ruler who poses and interprets. The result of the referendum is interpreted by the Katechon, the sovereign, the ruler, the one who has an invested interest in the preservation of the order and the regime. Therefore, 'the people' is revealed here as not being the sovereign; popular sovereignty is cancelled by the one who interprets the popular-general will.

Why the referendum, then? In general, why is there a need for the expression of a 'general will' in modern societies? To answer this question, one has to return to the issue of acclamation as the glorious aspect of power, as well as to the issue of the legitimate exercise of public power. Central to these issues is the appearance of a unified people and a unified popular will. Only when a decision issues from the will of the whole people is the exercise of public power legitimate. For this, it is necessary that the 'people' is 'present' as a unified political entity, and not as a sum of conflicting social classes with conflicting interests. So that, according to Schmitt, the 'people' appears to be present so long as it is not organised as an interest group (Schmitt, 2008, p. 272).

It was, therefore, important for the Greek people to 'appear', to show they are 'present', by answering in their sovereign capacity the question of the referendum. The interpretation of the verdict took place by the truly sovereign ruler, but the people needed to appear in order to dress the sum of individual *misinformed* opinions in the garments of the 'sovereign will' of the 'people'. To repeat a point made in the previous chapter, as long as the 'people' is a sum of individuals -and not an aggregate of social classes with distinct social interests- they provide a regime of power, property and productive relations with legitimacy. The 'general will' enunciated by the 'people' in acclamation is, therefore, necessary for the legitimate exercise of public power, since the 'people' legitimise the decision making of the ruler by assuming responsibility for the decision. The dialectic of the general and the particular points towards another point made earlier, namely the assumption by particular class interests of the appearance of generality. Alexander Hamilton's position in the Federalist papers that the class of merchants was the more capable of expressing the 'general interest' has implications in the discussion of the 'general will'.

If the 'free nature' of the general will serves to obscure its fragmentation and misinformation, its 'generality' serves to silence the particularity of contradictory social interests. It is pertinent here to refer to Althusser's conclusions on Rousseau's general will and general interest. For Althusser,



the notion of the general (or public) interest has a mystifying function, as it abstracts from the actual, particular and contradictory interests of the social agents. Rousseau's 'general will' can only function on the absolute condition that the will of classes/parties is silenced: If the general will is to declare itself, it is thus essential to silence (suppress) all groups, orders, classes, parties, etc. (Althusser, 1972, p. 150). This means not so much that the irreducible fact of the existence of social groups/classes/parties is an obstacle to Rousseau's theory of the inexistent 'general' and 'particular' interest of the isolated individual; it means rather that the particular interests of the ruling class are denegated and hidden in order for these particular interest to be presented to particular individuals as their general interest.

We come to the conclusion that the concepts of 'general will' and 'popular sovereignty' are not mere fictions, but concepts with specific role in a social formation. Their objective function consists in contributing to the legitimate exercise of public power. 'General will' as much as 'popular sovereignty' are revealed in the above analysis as necessary parts in a mechanism through which *misinformed opinions dress up with the garments of general will and sovereignty in order to legitimise decisions which would never question the reproduction of the status quo*. These concepts are essential elements of a totality of concepts of public law which objectively function to reproduce the regime of power, property, and productive relations of capitalism at all costs.

## V. Constituent power and general will

The concept of 'general will' is intrinsically linked to that of 'constituent power'. For Abbé Sieyès the constitution is emanating from the constituent will of the nation. As we saw above, for Sieyès, the relation between general will and legal form is one in which the will of the bearer of constituent power is the law. Therefore, constituent power is identified with the 'general will' of a 'people' which gives itself a new constitution, i.e. decides on the new form of existence of its political unity. Intrinsically linked to the concepts of the 'people' and 'general will' the idea of constituent power will also be critically assessed.

Constituent power helps us locate the source of modern political authority, and therefore the base upon which the structure of legal authority rests (Loughlin, 2003, p. 99). It refers to the relation between the people and the law, i.e. the relation between the bearer of constituent power and the form of its existence. It is juxtaposed to constituted power/form, which is the official power, the already instituted aspect of sovereignty. Only the latter, which is situated within the established

framework of constitutional authority, falls within the sphere of juristic competence (Loughlin, 2003, p. 99). On the contrary, constituent power, situated in the interstices between the legal and the political, assumes an extra-legal character.

What is the nature, then, of this extra-juridical power which is called constituent? Is this extra-legal power of a social and economic nature? Martin Loughlin would disagree. According to him, 'although the power of the state is to some degree a product of the material resources that a people is able to create through their labour power, constituent power must be differentiated from that social or economic power' (Loughlin, 2003, p. 113). He sees constituent power as a material (but neither social nor economic), extra-legal force that re-defines, in its recurrence, the already constituted. He rather identifies constituent power with Schmitt's idea of constitution-making power; a power which is already translated into the language of juridical institutions, even though determined by the external factor of political unity.

It is pertinent at this point to refer to Schmitt's concept of constitution-making power; a concept which Schmitt includes in his positive theory of constitutionalism, but which carries with it the vestiges of the homonymous politico-theological concept. For Schmitt, the constitution-making power is 'the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence' (Schmitt, 1928, p. 125). The constitution-making power is, therefore, political will. In fact, it is a central concept for Schmitt's theoretical apparatus and his position that the constitution is based on a political decision and not on a norm.

However, for Schmitt, that the constitution is an act of will does not resolve the general question of the source of validity of the legal order: 'Is law command, therefore will, or norm?' The reason for this is the politico-theological nature of constitution-making power. As we saw in the previous section, it is in the nature of the notion of the 'will' to have an inherent normative value, due to its infallibility. This normative element of the will is a vestige of the transmutation of the concept of 'divine will' in modern political theory in the form of 'general will' and 'constituent power'. If the constituent decision is an act of will this does not mean that it is not an act of normative character. In fact, law is both norm and will because what the people will is always right. Consequently, the higher norm which is 'willed' by the 'people' an inherent normative value even though it is an act of will.

Another evidence of the politico-theological vestiges of the concept of constituent power is its inexhaustibility. Constitution-making power is not exhausted because it was exercised once; it remains alongside and above the constitution (Schmitt, 1928, p. 126). It appears in its relationship

to 'every constituted power' as a metaphysical analogy to the 'natura naturans' and its relationship to the 'natura naturata' of Spinoza's theory: an inexhaustible source of all forms without taking a form itself, forever producing new forms out of itself, building all forms, yet doing so without form itself (Schmitt, 1928, p. 128). But, for Schmitt, it is necessary to differentiate the positive theory of constitution-making power from the pantheist metaphysic which is part of the theory of political theology. Nevertheless, this analogy highlights the metaphysical traits of the concept of constitution-making power.

Moreover, the continuity of these metaphysical elements is evident in the question of the subject of constitution-making power. Schmitt begins the discussion of this issue with reference to the medieval understanding that only God has a 'potestas constituens': The clause 'All power (or compulsion) is from God' (*Non est enim potestas nisi a Deo*, Rom. 13:1), means 'God's constituting power' (Schmitt, 1928, p. 128). In modernity, the fact that during the French Revolution the French people decided on the type and form of their political existence led Sieyès to develop his theory of constituent power whose subject is the 'people' or 'nation'. Nevertheless, the after-effects of the Christian theological images of God's constituting power were still strong and vital (Schmitt, 1928, p. 126).

In discussing the subject of constitution-making power, Schmitt distinguishes between the 'nation' and the 'people'. For Schmitt, the term 'nation' is clearer and less prone to misunderstanding as it signifies a unity capable of political action (Schmitt, 1928, p. 127). The homogenising effect of the concept of the 'nation' can more successfully insulate the subject of constituent power of any concrete social content<sup>28</sup>. The same can be achieved by the king who became the subject of the constitution-making power during the monarchical restoration (1815-1830) (Schmitt, 1928, p. 129). Of course Schmitt himself recognises the theoretical difficulties of such a thesis, as a dynasty cannot be considered the source of all political life. However, what is evident here is the instrumental role of the concept of constitution-making power in safeguarding

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<sup>28</sup> Such socio-economic content of the 'people' can be found, according to Jodi Dean, in the Lukacsian analysis of the Russian popular alliance of proletariat and peasantry (Dean, 2012, pp. 69-70). This conception of the people is based on the recognition of different (and at times even conflicting) social interests and class aims between the different social components of the 'people'; contrary to the crude abstraction and reduction of all social interests to the interests of the merchant class that we saw in Hamilton. Such a conception of the people, which takes into account the socio-economic contradictions and the development of contradictory relations between the classes comprising this 'people', is -as Lukacs calls it- a revolutionary and discriminating concept of the people, which can only develop through a concrete understanding of the socio-economic conditions (Lukacs, 2009). This conceptualisation of the 'people' necessitates a move from the fragmented immediacy of public opinion to the mediated totality of class consciousness, i.e. a Marxist analysis of legal and political processes, a contribution to which the above analysis aspires to be.

the necessary unity against centrifugal or insurgent tendencies for the reproduction of a regime of power and property relations.

## VI. Constituent power and constitutional form

Schmitt's influence is evident and strong even in recent attempts of conceptualising the concept of constituent power. Martin Loughlin, Hans Lindahl and other constitutional theorists have collaborated in a collective work which concerns itself with the relation between constituent and constituted power, or, as they call it, with the paradox of constitutionalism. Central to the formulations of this paradox of constitutionalism is 'the tension linking -and also the question of priority between- constituent power and constitutional form, politics and law' (Loughlin & Walker, 2007, p. 1). The starting point of this enquiry into the paradox of constitutionalism is de Maistre's statement on the ambiguous nature of popular sovereignty which we encountered in the previous chapter.

The people, in Maistre's words, 'are a sovereign that cannot exercise sovereignty'; the power they possess, it would appear, can only be exercised through constitutional forms already established or in the process of being established. This indicates what in its most elementary form can be called the paradox of constitutionalism (Loughlin & Walker, 2007, p. 1).

Thus, on the one hand we have law and constitutional forms, and on the other politics and constituent power. The paradox consists in that the constituent power of the people can only be exercised through constituted forms. For Lindahl too, the starting point of the contemporary analysis of constituent power is Schmitt's 1928 'Constitutional Theory'; a book which relentlessly moves to recover the primacy of constituent power over constituted power by arguing that 'the concrete existence of the politically unified people is prior to every norm' (Lindahl, 2007, p. 9). The battle between constituent and constituted power is personified in Schmitt and Kelsen and their theoretical gigantomachy (Lindahl, 2007, pp. 9, 10, 11).

The paradox in the heart of law, the paradox of constitutionalism, lies in the equivocation between constituent and constituted power. Let us revisit the antithesis between Kelsen and Schmitt, which we analysed in the previous chapter, under the prism of this new dualism. Legislation is the act of constituent power 'but because the law can only think of power as legal power, an act can only initiate a legal order if it is retroactively interpreted as an empowered act -

the exercise of constituted power' (Lindahl, 2007, p. 9). By denying the prior existence of the people as a political unity, Kelsen, in Schmitt's eyes, collapses constituent into constituted power and politics into law, thereby hypostatizing the legal order into a self-grounding, self-serving, and self-sustaining system of rules (Lindahl, 2007, p. 9).

The only way out of this paradox is by vindicating Schmitt's claim against Kelsen, that no sense can be made of the unity of a legal order without the political unity implied in the first-person plural perspective of a 'We' as a subject in constituent action. According to Lindahl, Schmitt is right when he objects to Kelsen that the attribution of legislation to a collective is, first and foremost, self-attribution, an act by which the members of a community view legislative acts as their own (joint) act (Lindahl, 2007, p. 16). Therefore, the subjective element of the object-subject relation we encountered in the previous chapter is prioritised and the source of validity of the objective legal order is attributed to the constituent subject.

But, once again, we rid ourselves from one paradox only to encounter it in a different form. As Lindahl points out, Schmitt articulates his politico-theological reading of constituent and constituted power in terms of the simple opposition between presence and representation. The key to constituted power is the attribution of the act of an individual to a collective. Furthermore, attribution has a representational structure, since the essence of the organ is that it represents the state. So, constituted power is linked to representation. Constituent power, then, would have to be linked to pure presence; for Schmitt the pure presence of the 'people' as expressed in their *identity* with the Sovereign is far superior to the representation of the people by the Parliament.

And not only is representation inferior, but the notion of representation contradicts the democratic principle of the identity of the people that is present to itself as a political unity (Schmitt, 1928, p. 262). Schmitt, however, is aware that although the democratic self-constitution of a polity is incompatible with representation, no actual political community is possible without *some form* of representation; a position which has been reiterated above. In fact, multiple times in this chapter and the previous we have seen the resolution of this paradox in favour of representation and constituted forms. The attribution of legislation to a collective is governed by the paradox that an act can only originate a community by representing its origin. The political unity is presupposed-constituted and is represented in the constituent decision. As a result, the relation is reversed once again. There is equivocation between constituent and constituted power.

For Lindahl, the paradox of constitutionalism consists in the necessity of a constituting act which blocks the pure presence of constituent power, of collective selfhood. And the resolution of the paradox lies in the constant redefinition of the constituted -the existence of which is necessary. In

this reformulation of the paradox radical openness corresponds to constituent power and closure corresponds to constituted power. According to Lindahl, a space remains open only if no claim is made in the name of a whole; but without such claim, no alternative political and legal order can be founded. The price of radical openness in politics is the loss of constituent power, but unless the multitude becomes a unity in action, unless it ceases to be a multitude and becomes a collective subject, it cannot constitute itself as a political community (Lindahl, 2007, p. 18).

As a result, Lindahl's attempt to go beyond the Schmittian ontology of substances leads him to the conclusion that the collective self exists in the modes of questionability and of responsiveness<sup>29</sup>. He equates constituted and constituent power. Their relation is one of temporal sequence and unity to sustain a polity. They are not incompatible. In fact both of these concepts serve to legitimise 'distinctive manners of political existence'. The relation between the 'people' and the person/institution which speaks on its behalf is crucial for the innovation and rupture of the constituted sphere; and this relation has to function in the mode of questioning. We reach the conclusion that Lindahl's analysis shares similarities with Loughlin's idea of sovereignty as a relational concept. The constant redefinition of the politically unified people -i.e. the collective selfhood as he puts it-, which is the main function of constituent power, can take place within the confines of the legal sphere.

For Lindahl, relationality translates into questionability. But this function of questioning the sovereign-qua-constituted can take place within the confines of the constituted power itself. This conclusion is not shared by Emiliios Christodoulidis. For him, the constituent is crucially linked with what may establish itself otherwise, so that emphasis must be placed on the constitutional thinking of dissensus. The function of dissensus is the constant redefinition of the first person plural. Christodoulidis argues against the conflation of constituent and constituted power. But since, as we saw above, the paradox necessitates that the political power must take some representational form, a formal structure must be created to institutionalise the equivocation between these two powers.

The 'we' of politics *must remain alive* in the dimension of the constituent and not forever be traded in for what institutions offers as default settings to regularise and customise invocations of the first person plural, of sovereignty and mutuality in the public sphere'. [...]. The point is that the invocation of the 'we' only stands to the extent that s/he who has not spoken it *consents* to what was uttered in her name. [...] Consent to inclusion can only

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<sup>29</sup> Constituent power is never a pure decision that 'emanates from nothingness', in the manner of a secularised actus purus. A collective can only act by re-acting to what, preceding it at every step, never ceases to confront it with the question, 'Who are we?' Constituent power comes second, not first (Lindahl, 2007, p. 21).

be certified after the event, that is, after the invocation of the 'we' has been effected (Christodoulidis, 2007, p. 205).

The collapse of the constituent on the registers of the already instituted is thus prevented by a mechanism which guarantees that the consent of the people must be obtained, or that their dissent must be expressed. Constituent power is prioritised and its function is the constant redefinition of the political unity, the constant dialogue between represented and non-represented. As a result, dissensus implies the notion of responsiveness and relationality, in the same spirit as Loughlin's and Lindahl's solutions, but it is also distinguished from them. Dissensus is the expression of a *different* opinion from the one officially held. For the dissenting process to take place, i.e. for the constituent power to be expressed, a forum is presupposed and so is a first official position to which the dissenting opinion responds.

The irreducibility of the political to politics, of the constituent to the constituted, underpins our ability to break from, to imagine otherwise, and to renew beyond the modalities of what has already been instituted, and it is in this 'otherwise' that the thinking of dissensus emerges (Christodoulidis, 2007, p. 195).

Relationality, responsiveness, questionability, dissensus: these are the features of the constituent-constituted relation, which purport to give a solution to the paradox of constitutionalism. The positive aspect of the above refreshing analysis of the paradox of constitutionalism is located in the move beyond the oneness of sovereignty towards the constant re-definition of the constituted order. Constituent power urges us to break from, to imagine otherwise, to renew, to dissent. But this negation, as long as it does not designate against what we dissent, what we renew, from what we break away, and other than what do we imagine, risks remaining an abstract negation.

For instance, a counterrevolution is a movement of dissent towards the revolutionary movement. Is that also an expression of constituent power, then? Were the revolts of the Monarchists in the Vendée during the French Revolution or the White Movement during the October Revolution expressions of constituent power? Schmitt would probably see the forces behind these movements as carriers of the constitution-making power, had they succeeded in overthrowing their revolutionary counter-parts. After all, we saw above that he considered the king as the subject of constitution-making power after the restoration of 1815.

We claim that the separation of form and content and the absence of a substantive criterion, with which to judge and answer such questions, risks rendering constituent power an abstract notion which cannot help us conceptualise the dialectical totality of the legal form and socio-political

struggle. For such conceptualisation the issue is determinate negation and the analysis of the constitutional form in its unity with the developing socio-economic contradictions. Let us illustrate this point with reference to another exponent of the notion of constituent power and the dialectics of the abstract and the concrete.

## VII. The metaphysics of constituent power

The analysis of constituent power as part of the unity of concepts of public law continues in this section with an examination of the elaboration of Antonio Negri on the concept. In particular, the aim is to examine whether constituent power can help us conceptualise the relation between the constitutional form and the socio-economic relations, or whether it is a notion whose fictional elements outweigh any analytic qualities. The antitheses between metaphysics and dialectics, abstract negation and determinate negation, fragmentation and movement, will underlie this examination, as Negri's constituent power will be shown to focus on fragmented events, not historical processes, and on the 'irrational force of desire', not on the socio-economic contradictions of class struggle.

To begin with, in his 1999 work 'Insurgencies: Constituent power and the modern state', Antonio Negri attempts to trace the functioning of and the elaborations on constituent power throughout the modern history of the Western world. He focuses on main events: Machiavelli and Italy of the Renaissance, Harrington and the English Revolution, the American Revolution, the French Revolution, Marx and the proletarian revolution. Negri does not give a comprehensive definition of constituent power, but the book is filled with many dispersed attempts at defining this fundamental term. He seems to extract one major property-characteristic from each historical event to include it in the notion he tries to construct. So, the Machiavellian moment gives *innovation and openness* as characteristics of constituent power; the Harringtonian moment gives the *moment of negation* and the function of constituent power as *counter-power*; the American Revolution gives the element of *space*, while the French Revolution the element of *time* and last but not least, the Marxian moment gives the idea of *permanent movement/revolution*. A first methodological point can be raised here, which is important for the nature of the concept of constituent power. Negri does not explain the notion of constituent power through a concrete analysis of the French Revolution, the English Revolution or the October Revolution. On the contrary, he tries to explain *all* revolutions, without differentiation, through his notion of



constituent power, which acquires a property/characteristic from each of these events (ruptures as he calls them).

Furthermore, with regards to the relation between constituent and constituted power, Negri prioritizes the former: 'Constituent power is primary in the sense that it is the locus of social creativity, political innovation, and historical movement. Constituted power is empty; it merely falls back on, contains, and recuperates the constituent forces' (Hardt, 1999, p. viii). But, constituent power is not solely associated with exceptional outbursts; it remains active yet latent in human praxis.

Constituent power animates the *constant activity of resistance and organisation*, rebellion and political innovation that arises within and against the constituted order. It may appear, then, that constituent power is exhausted or extinguished in each revolutionary process, but really it is only temporarily blocked and mystified by the constitutionalism of the new ruling order. *Negri understands constituent power as a process of permanent revolution* (Hardt, 1999, p. viii).

As the animator of the 'constant activity of resistance and political innovation' Negri's constituent power does not seem so dissimilar from the concept we encountered in Lindahl's and Christodoulidis's analysis. Furthermore, Negri attributes the concept of constituent power with the characteristic of permanent revolution. A materialist element can be detected in this approach which links the socio-political process of the revolution to the juridical process of constitutionalism. According to Negri, 'the constituent principle reveals itself as *latency of a very strong potential of destruction*, and at the same time of *transformation of the present state of things*' (Negri, 1999, p. 137).

Innovation, transformation, destructive negation, and permanence of movement: these characteristics, abstracted from concrete historical events, form the nucleus of the notion of constituent power. And as a force that '*challenges the stability of the constituted order and invents alternative forms of social organisations*', constituent power is posed as the essence of the political. The 'political' is here juxtaposed to 'politics' -the administration of the constituted order to maintain social equilibrium- which Negri, following Ranciere, finds not political at all (Hardt, 1999, p. ix). *The political*, like constituent power, is characterised by its absoluteness and irreducibility, its eternal return. Constituent power and the political is what resists to be subsumed into constituted power and politics, and returns eternally to redefine the latter.

The constitution of the social is a strength founded on *absence* -that is, on *desire*- and desire unceasingly feeds the movement of strength. Human strength produces a continual *dislocation of desire* and accentuates the absence on which the innovative event is produced (Negri, 1999, p. 14).

Constituent power, as much as Schmitt's political decision, is thus seen as an *irrational force* which emerges 'from the vortex of the void, from the abyss of the absence of determinations, as a totally open need'. The materialist element of the revolution we encountered above seems to be displaced here by the idealist elements of absence and irrational desire. What is more, this desire seems abstracted from any sort of social, political, or historical context. To ask a question we already asked above: Is the counter-revolution -which, according to Negri's analysis, expresses movement based on absence and an irrational desire- an expression of constituent power?

We argue that Negri's formal analysis cannot answer this question in a manner that does not conflate between the processes that seek to reproduce and those that seek to overthrow a specific regime of power, property, or productive relations. And the reason is that Negri adopts the abstract and metaphysical conception of constituent power, as formulated by Carl Schmitt as a celebration of conflict, disunion, and continuous rupture (Negri, 1999, pp. 78, 80, 82, 83). To further this point, let us look at Negri's reference to Hannah Arendt's analysis of the revolution. For him Arendt has given us the clearest image of constituent power in its *radicalness and strength*; of a constituent principle which is *ontologically grounded* (Negri, 1999, p. 19).

Arendt's interpretation of Schmitt can be seen in the *perception of an unexhausted expressive radicalness* (which can simultaneously be a subject) that issues from the *constitutive source* and that is located in the *need for the decision* and in the identification of friend and enemy. The sovereign is the one who can 'suspend' the law, who can thus suspend the law that itself establishes sovereignty, who can make constituent power consist in the *principle of its negation* (Negri, 1999, p. 21).

It is noteworthy that Schmitt forms once again the background of the analysis which focuses on another aspect of constituent power: its principle of negation. Let us focus on the nature of this negation to point towards the limitations of Negri's formalist approach. The dialectical negation can never be separated from the process, the total movement of negation. The dialectics as a way of viewing reality in its movement sees the process of negation as always followed by another movement, the negation of the negation. However, this sequence is not an abstract sequence of points in time. In Hegel's *Phenomenology* it is a process whose function helps us reach a mediated and enriched level of cognition, while in Marx's *Capital* it is a process which helps us

ascend from the abstract to the concrete, from the surface of circulation to the process of production. A dialectical analysis cannot separate the negative moment from the whole movement of negation; it cannot separate form from content. A dialectical analysis asks the question: A negation of what? The negation has to be a determinate negation. But this presupposes the study and the analysis of the concrete as a fundamental principle of the dialectics.

On the contrary, Negri's constituent power is characterised by the movement of abstract negation. Negri understands constituent power as a metaphysical eternal occurrence of this abstract negative power throughout history. Of course he associates the recurrence of this power with social and political action. But, there is no analysis of the concrete forces and the concrete socio-historical conditions which led to the historical events that Negri interprets as occurrences of constituent power. So, Negri's schema of abstract negation can be summed up as follows: as the temporal succession of the two pairs (constituent power/revolution and law/constitution) in the form of a continuum; constituent power/revolution overdetermine and give meaning to law/constitution but are irreducible to the latter; yet they remain latent as the eternal possibility of their recurrence. Let us further illustrate this point by looking at Negri's analysis of the historic process of primitive accumulation through the concept of constituent power.

### VIII. Abstraction, totality and constituent power

We saw above that for Negri constituent power is a power with ontological rooting; it is a social counter-power and not simply a juridical power; it has a spatial dimension; and it is characterised by the continuity of temporal action (Negri, 1999, p. 251). However, it is modern capitalism which 'brings to maturity the concept of constituent power, as the pervasive force of the entire society, as the continuity of a social power that absorbs and configures all other powers' (Negri, 1999, p. 251). Consequently, Negri analyses the historic process of primitive accumulation as an instantiation of constituent power.

Marx really deals with modern constituent power in *Capital*. This is where he confronts the riddle of the originary, constitutive violence of the social and political order. This is a double problem that points on the one side to the identification of founding violence and on the other to its ordering function action (Negri, 1999, p. 252).

As is obvious in the above passage, Negri uses the notion of constituent power to refer to capital, and more specifically to the historic process of primitive accumulation as the originating violence of capital.

First of all, then, we need to follow the line that leads *from accumulation to violence to law*. Constituent power is here the originary exercise of violence by the ruling class. We are at the centre of the ‘secret of primitive accumulation’, the ‘original sin’ at the heart of political economy. This is where Marx demonstrates how force and violence are typical phenomena of capitalist accumulation. [...] Through violence capital has created the conditions of ‘capitalist’ development, conditions reached through the polarization of the market of commodities. On one side stands the ‘free’ worker and on the other the conditions of the realization of labour action (Negri, 1999, p. 253)

Negri here deals directly with Marx’s elaboration on the role of law in the historic process of primitive accumulation. He applies the sequence ‘accumulation-violence-law’ in order to locate the role of constituent power in the middle, as the constitutive violence which follows accumulation and determines a new constituted order. His analysis reduces Marx’s one to the simplified schema of ‘accumulation-violence-law’, with violence as the constituent power determining the constituted power of law<sup>30</sup>. Negri uses the dualism of constituent power and constituted power, following each other in a schematic sequence, to present Marx as a Hobbesian who defines right as immediate superstructure of violence.

Constituent power has become a constituted power, a sort of average level of violence that overdetermines every social relationship. This is the first vector: violence is constituted as the centre of every power and every right, a fortiori as expression of constituent power. We might think of this as a *Hobbesian Marx*, who defines *right as immediate superstructure of violence* and as process that refines violence, and thus who reveals the secret of right action (Negri, 1999, p. 254).

In presenting Marx as a Hobbesian Negri essentially reduces the development of the capitalist relations of production to a phenomenon of violence. His statement that violence and domination are constitutive forces of capitalism contains an element of truth in the sense that one of the

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<sup>30</sup> Violence is the constituent datum: datum and continuity, fact and organization, effectiveness and validity. It begins to be dressed in juridical forms when it is exercised most intensely. It puts on and off legal garb. Once the expropriation has taken place and accumulation manifests itself in a first capitalist ‘organization’ of the new mode of production, then the law -the direct expression of the revolutionary violence of the bourgeoisie- takes on a prominent form. [...] Violence thus constitutes the vehicle between accumulation and right. It has no problem presenting in legal terms, or better, making law a subsidiary element of accumulation action (Negri, 1999, p. 254).

functions of the legal form is to mystify the originary violence and domination<sup>31</sup>. The crucial move, however, is to go beyond this immediate violence, towards the exploitation which is mediated through the violence of the legal and political apparatus. Law as bourgeois right is not constituted by violence in the abstract, but by a specific and concrete conception of violence which is determined by the property and productive relations of capitalism. Law in this sense is not determined by some sort of irrational violence, but by a violence which serves the -rational, oh so rational- function of reproducing this regime of property and productive relations.

For this reason it is indispensable to examine law and the legal form in its unity with the developments in society and the economy. According to Marx, the process of primitive accumulation transformed the money relation to capital relation through the separation of the labourer from the objective conditions of labour, i.e. the expropriation of peasants, the accumulation of land in the hands of few land-owners who owned money, the expropriation of state and church land. The objective function of law -in the form of the Enclosure Acts, the Poor Laws, or the Bloody Legislation- in this process has to be concretely assessed in its relative autonomy in each case. However, the totality of these elements cannot be separated if we are to comprehend the role and function of law in the development social formation. The secret of primitive accumulation can only be unravelled through the conception of the totality which consists of the developing property and productive relations of capitalism.

The hindering or facilitation of the development of these property and productive relations and the subsequent ensuring of their reproduction is a fundamental function of law in this totality. In the feudal social formation, exploitation went hand in hand with subjugation, and relations of exploitation could not be distinguished from (hereditary most of the times) relations of state domination and social subjugation. Contrariwise, in capitalism, relations of exploitation are separated from relations of domination, in the sense that exploitation takes place between two free and equal legal subjects, the employer and the employee, the capitalist and the labourer. Relations of exploitation and relations of domination are both mediated through one another. Exploitation is mediated through the legal form and the public power of the state, which directly intervenes whenever the specific one of the parties becomes conscious of its exploitation and seeks to struggle for its termination by means such as the general strike

As a result, the crucial point in Marx's analysis, not only of primitive accumulation, but of the capital relation in general, is not the constitutive role played by violence as Negri argues, but the

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<sup>31</sup> To forget that violence and domination are the constitutive forces of the system is illusory and hypocritical. It is tantamount to entrusting ourselves naively to the 'pompous catalogue of the 'inalienable rights of man'' action (Negri, 1999, p. 255).

totality which consists of the relations of production and the legal and political form in their dialectical unity. Exploitation is mediated through violence. It determines the function of state violence and state violence serves to reproduce it. It is, then, exploitation which is masked and not violence. And it is masked by what Benjamin calls mythic violence, the phantasmagoria of capitalism which serves to perpetuate its constitutive illusions. And integral among these illusions are the legal fictions which have formed the object of the analysis so far, namely the *fictio juris* of the ‘legal subject’ and that of the ‘sovereign people’, or the fiction of the ‘social contract’. Marx refers to this mythic function of the legal form of contract in *Capital*.

The relation of exchange between capitalist and worker becomes *a mere semblance* belonging only to the process of circulation, it becomes *a mere form*, which is alien to the content of the transaction itself, and merely mystifies it. *The constant sale and purchase of labour-power is the form; the content is the constant appropriation by the capitalist, without equivalent, of a portion of the labour of the others which has already been objectified*, and his repeated exchange of this labour for a greater quantity of the living labour of others (Marx, 1976, pp. 729-730).

In the above passage form and content are seen as interwoven. The contractual form of ‘the constant sale and purchase of labour-power’ is the necessary expression of the content of the constant appropriation by the capitalist, without equivalent, of a portion of the labour of the others which has already been objectified. The legal form mediates the productive relation of exploitation. This is no abstract violence, but a specific form of economic violence taking place between free and equal legal subjects, which the legal form expresses and functions to reproduce. By separating form and content, the legal form of property and contract, based as it is on the fundamental dualism of the legal subject and the objective legal order, ensures the functioning and reproduction of these relations by mystifying the constant appropriation by the capitalist, without equivalent, of a portion of the labour of the labourer.

A fundamental role in this process of reproduction is played by the public law concepts which determine the form of exercise of public power. The above analysis of the notion of ‘constituent power’ and its place in this unity of concepts examined so far has revealed it as an essential element of this unity. In particular, Negri’s conception of constituent power was examined in its potential to help conceptualise the relation between the constitutional form and the socio-economic relations. We saw that Negri’s notion abstracts from the concept of social revolutions only the general element of rupture leaving outside the particular concreteness, i.e. their relation to social and economic processes and contradictions. It assumes, thus, a metaphysical character of

an abstract, a-temporal power, which is not so dissimilar from Carl Schmitt's notion of 'constitution-making power' which was examined above.

We conclude that the notion of constituent power, as much as that of the 'general will', is an essential component of the totality of concepts which legitimate the exercise of public power in modernity. It remains essentially within the juridical field while opening its closed system to the irrational workings of 'the political'. In that manner it objectively functions to reproduce a regime of power, property and productive relations by legitimising the source of authority of the fundamental rules of exercise of public power, which is attributed to an originating constituent and metaphysical act of a unified people. As a result, it is an essential supplement of the *fiction juris* of the unified people. A unified 'people' is simultaneously presupposed and the outcome of the expression of the 'general will' -which may appear regularly in general elections, referendums, or other plebiscitary institutions- as well as of the expression of 'constituent power' -which as the originating source of the fundamental rules of exercise of public power assumes a more 'exceptional', albeit ever-present, form.

This concludes the non-exhaustive analysis of the internal unity of concepts of public law. In these two chapters the dualistic form of public law -appearing in the concepts of 'the King's Two bodies', of 'popular sovereignty', of the 'social contract', 'objective and subjective law', 'norm and decision', 'general will' and 'constituent power'- was analysed in its historical genesis and socio-economic function. Our hypothesis that the legal form and different forms of exercise of public power cannot be separated from the examination of the contradictory movement of social and economic relations and the intensification of these socio-economic contradictions will be now furthered by looking into concrete examples of how the concepts examined so far relate to each other to accommodate changes in the socio-economic sphere. In particular, the change in the form of exercise of public power and its effect on this unity of concepts of public law will be examined in two concrete cases: the shift and continuity of Schmitt's theoretical framework during the transition from the Weimar Republic to the Nazi state form; and the form of the Memorandum of Understanding in the context of the Greek crisis legislation after 2010.

## Chapter Four: From Weimar to Nazi state form

The first Part of this analysis examined the first hypothesis here advanced, namely that public law assumes a dualistic form because of its specific function in the totality of the social formation in reproducing *a regime of power, property and productive relations*. To this end, principles (such as ‘popular sovereignty’, ‘legal subject’ and ‘general will’) and conceptual pairs (‘norm-decision’, ‘individual-general will’) were examined in their interaction with each other, but also in their relation to the reproduction of a specific property regime.

This Part focuses on the second hypothesis advanced, namely that the change in the form of exercise of public power corresponds to different levels of intensification of socio-economic contradictions. It continues the application of the bidirectional analysis of law, as outlined in the first chapter, which combines the internal aspect of the examination of the main concepts of liberal constitutional theory in their internal unity, with the external aspect of examining their relation to the development of socio-economic conditions. The only difference is that this chapter focuses on concrete cases in order to illustrate its analysis and conclusions.

The internal unity of public law concepts will be analysed in two specific historical situations in order to show how these concepts relate to one another to accommodate the change in the form of exercise of public power due to the intensification of socio-economic contradictions. The first chapter is an examination of the change in the form of exercise of public power in mid-war Germany, from the Weimar Republic to the Nazi state. It focuses on two aspects: on the one hand, on the change and continuity of concepts used for the legitimation of the regime; on the other hand, on the relation of these changes to the intensification of socio-economic contradictions in mid-war Germany. The second chapter looks at the internal unity of principles used by the judiciary and the law-making mechanisms (of the European Union and the Greek state) to legislate in the context of a crisis-ridden Greece after 2010.

In particular, the change from the Weimar to the Nazi state form, and the ‘exceptional’ legal form of the Memorandum in the context of the Greek crisis, will be examined with a view to analysing the change in the public legal form and the intricate relation between norm and exception, as the two main forms of exercise of public power. For this reason the chapter will begin with an examination of the existing literature on the relation between norm and exception. There have been various attempts at conceptualising this relation and two of these will be analysed, namely Giorgio Agamben’s and Mark Neocleous’s. However, the relation here will be examined from a Marxist standpoint, furthering Neocleous’s critique of Agamben.



Norm and exception will be seen in their unity, as intrinsically related forms whose objective function is to reproduce a regime of power, property, and productive relations and whose change in one another finds its essence in accommodating the intensification of socio-economic contradictions which pose a threat to the reproduction of said relations. To this end the concepts of 'necessity' and 'general interest' will be analysed alongside concepts already examined. In particular, necessity, which as a term is used interchangeably with 'emergency' and 'exception' to signify this institution of the liberal democratic state, points towards the continuity of state power notwithstanding the form of its exercise. It also relates to the concept of 'reason of state', a concept which objectively reflects the 'general interest'. In fact, the 'state of necessity' serves the 'reason of state' insofar as it safeguards the 'salus populi', i.e. insofar as it promotes the welfare of the citizens.

This unity of concepts will be analysed in both its internal relation and in the role it played in two concrete historical cases of political and economic crises. The notions of 'salus populi' and 'general interest' function on the basis of the fiction of a 'unified' people which mystifies the existing social contradictions and class divisions. This 'oneness' will be 'deconstructed' with reference to Hegel's analysis of the institution of *Notrecht*. Ultimately it is argued that both the normal and the exceptional form are structured around this 'oneness'. They both objectively function to reproduce the same regime of relations and their difference consists precisely in this: that they correspond to different levels of intensification of the socio-economic and political contradictions.

The chapter will then move to the analysis of a historical case of change in the form of exercise of public power, namely the change that took place in mid-war Germany from the Weimar to the Nazi state form. This case study will serve to illuminate how a change in the public legal form - from normal to exceptional, or from Weimar to Nazi- may be necessary in order to accommodate rising socio-economic and political contradictions. The case of Weimar is an example of how the constitutional form had to change because it could neither contain nor withstand the capitalist antagonisms and contradictions it overlaid.

## I. Exception, emergency, necessity

To begin with, the institution of the 'state of exception', which originated in Roman law and the medieval concept of 'necessitas', allows the polity to employ exceptional measures in order to save itself from an imminent threat towards its existence. In its modern form, this institution is directly linked with the rise of the liberal constitutional state. The state of exception guarantees the existence of the Constitution, i.e. the preservation of its opposite. This essential mechanism for the self-preservation of the state and the safeguarding of the legal order is to be seen here as a mechanism for the reproduction of a regime of power, property relations and productive relations. To this end, the different nuances between the terms 'exception', 'emergency', and 'necessity', which are often used interchangeably to refer to this institution, will be examined.

The major exponent of the term 'state of exception' is Giorgio Agamben. His analysis of the state of exception is based on Schmitt's famous statement that 'sovereign is he who decides on the exception'. Agamben builds on Schmitt's analysis in order to examine the relation between law and exception, in what he calls the 'paradox of sovereignty'. For Agamben, 'the paradox of sovereignty consists in the fact the sovereign is, at the same time, outside and inside' (Agamben, 1998, p. 15). The sovereign, having the legal power to suspend the validity of the law, legally places himself outside the law. 'The rule applies in no longer applying, in withdrawing from it. According to its etymological root, the exception is truly taken outside (*ex-capere*), and not simply excluded' (Agamben, 1998, p. 18).

It makes sense, thus, for Agamben to use the term 'state of exception' on the grounds that exception connotes being 'taken outside'. Schmitt himself had opted to talk of the state of exception, rather than emergency, on the grounds that not all states of emergency constitute a threat to the norm or a challenge to sovereignty (for instance, states of emergency called on the grounds of 'natural' catastrophes). This relation of liminality included in the notion of the exception, allows Agamben to claim that 'modern totalitarianism can be defined as the establishment, by means of the state of exception, of a legal civil war that allows for the physical elimination not only of political adversaries but of entire categories of citizens who for some reason cannot be integrated into the political system' (Agamben, 2005, p. 2).

Moreover, this state of exception has by now become the rule, resulting, thus, in a new form of government, which knows no law and is bound by no law. This form of government is particularly evident after 9/11 and it is captured in the idea of the 'camp', an example of which is the legal blackhole of the Guantanamo bay. This argument is furthered in the most recent text in

which Agamben criticises what he now calls a ‘security state’. Agamben sees the recent extension of the state of emergency in France as a further step in the radical transformation of the model of the State with which we are familiar. So, even though Agamben uses the term ‘security state’ more than the term ‘state of exception’, it is evident that the latter is the specific characteristic of the former, and that this analysis of the security state is an extension of the argument on the process of transformation of the state form into a ‘permanent state of exception’.

As is evident from the title of Agamben’s essay, the ‘Security State’, this new form of government, has nothing to do with the ‘State of Law’. In other words, we are dealing with a complete separation between the corresponding forms of ‘state of exception’ and ‘rule of law’. Agamben raises two points in this regard. First, in this new form of government, the term ‘security’ has impregnated political discourse and ‘reasons of security’ have taken the place of what used to be called ‘reasons of State’. So, we have another juxtaposition, between ‘reasons of security’ found in the security state, and ‘reasons of state’ found in the state of law. Furthermore, this juxtaposition is based on the role played by fear and its cultivation by the state. Here, Agamben juxtaposes the classical model of Thomas Hobbes -where the social contract transfers powers to the sovereign, creates the state, and eliminates fear- to the Security State, where this schema is reversed: ‘the State is durably grounded in fear and must, at all cost, maintain it, because it draws from it its essential function and its legitimacy’ (Agamben, 2015).

Therefore, according to Agamben, there is a fundamental difference between Hobbes’s state, which provides security and puts an end to fear, and the Security State which perpetuates the fear which legitimises it. A few questions are automatically raised: First of all, does Hobbes’s state put an end to fear? Is there a fear to begin with, or is this an ideological element with a legitimating function? What does Hobbes’s state secure? What does it secure against? Parallel to these, why does the security state need legitimation? What does it safeguard? If the Security State is not identified with the state of law, what is the relation between them? More importantly, isn’t security at the basis of the liberal ‘State of Law’, as Karl Marx has shown since the ‘Jewish Question’?

This is a point of fundamental importance because Agamben’s complete separation of the Security State from the State of Law is based on the predominance of security in the former as opposed to the latter. But, as Marx has argued, ‘security is the highest social concept of civil society, the concept of police, expressing the fact that the whole of society exists only in order to guarantee to each of its members the preservation of his person, his rights, and his property’ (Marx, 1987, p. 163). Consequently, what is the difference between ‘security reasons’ and ‘raison

d'état'? What is the content of *raison d'état* if not the security of property, i.e. the reproduction of a property regime?

Agamben's complete separation of the 'state of exception' from the 'rule of law' comes under criticism by Mark Neocleous. Neocleous argues (based on historical evidence gathered from the UK, the USA, Israel, and South Africa and Latin American countries) that emergency powers are far from exceptional; rather, they are an ongoing aspect of normal political rule and have been crucial to the consolidation of capitalist modernity. To criticise, as Agamben does, the use of emergency powers in terms of a suspension of the law is to make the mistake of counterpoising normality and emergency, law and violence. Neocleous opposes this rigid separation as well as the idea of the permanent state of exception which stems from it.

For this reason, he opts for the term 'state of emergency' instead of 'state of exception', since the state of emergency is what emerges from the rule of law when violence needs to be exercised and the limits of the rule of law overcome. 'Where 'emergency' has this sense of 'emergent', exception instead implies a sense of *ex capere*, that is, of being taken outside. Far from being outside the rule of law, emergency powers emerge from within it. They are thus as important as the rule of law to the political management of the modern state' (Neocleous, 2006). In this manner, Neocleous's 'state of emergency' reveals the unity of law and exception. 'Emergency powers do not involve some kind of suspension of law while violence takes place, but are united with law for the exercise of a violence necessary for the permanent refashioning of order' (Neocleous, 2006).

Furthermore, this unity of law and exception points towards the socio-economic content which determines these different forms. The fact that every constitution contains provisions for emergency rule leads to the conclusion that 'the ruling class was never going to be so stupid as to produce a constitution that does not allow it to suspend fundamental liberties and rights in the name of emergency' (Neocleous, 2006). There is, one could argue, a fundamental need of the ruling class which is served by the existence of constitutional emergency powers. The institution of 'emergency powers', therefore, objectively functions to reproduce a regime of power relations which safeguard specific social interests.

In addition to this, Neocleous raises a related point, namely that reducing the resistance to emergency measures to a return to legality, i.e. a return to the normal mode of governing through the rule of law, is based on the illusion that law has a life of its own. The rigid juxtaposition of law and exception can be as harmful for a critical analysis of the legal form as the reductionist analysis of the two forms which fails to take into account of the differences and nuances of the

two. Consequently, it is important to further Neocleous's analysis against 'abstracting the rule of law from its origins in class domination and oppression', while showing, at the same time, what makes this change in form necessary. In doing so, we opt for the third term used to characterise the emergency legislation, i.e. the 'state of necessity'.

This is done for two main reasons. First, because necessity helps us grasp the continuity of the state's function and the continuity of law's legitimating function. In the following sections it will be argued that in the state of emergency the state acts as representing the 'general will'; it acts in the 'general interest'. But, this 'general will' serves as the legitimating basis not only during exceptional, but also during normal times. Second, the concept of necessity helps us grasp the root of this continuity in the relation of this legitimating function with a regime of property and productive relations whose functioning and reproduction is ensured by this function (whether in normal or exceptional form).

Agamben himself criticises the view which posits the concept of necessity at the foundation of the state of exception (on the basis of the maxim '*necessitas legem non habet*'). According to him, 'necessity is not a source of law, nor does it properly suspend the law; it merely releases a particular case from the literal application of the norm' (Agamben, 2005, p. 25). He argues that the ultimate ground of the exception is not necessity, but the principle according to which 'every law is ordained for the common well-being of men'. So, for Agamben, the state of exception suspends the juridical order as such as it is based on the '*salus populi*', whereas with necessity it is a question of a particular case.

But is necessity merely a question of a particular case or of the juridical order as such? Of course necessity is not a source of law and it does not suspend the law. On the contrary, it is congenital with law and the state and determines its form. It does not merely release a particular case from the application of the norm; it underlies the norm as a whole; the norm-qua-objective-legal-order is a necessity for the reproduction of the relations of production, for the 'general interest', and this general interest lies at the bottom of both norm and exception. Therefore, necessity may not itself be a legal rule, but it lies 'within' the rule itself. The metaphysical separation of normality and exceptionality vanishes because necessity lies within the legal rule itself.

## II. A dialectical understanding of necessity

At the outset, it has to be noted that necessity is understood in its dual capacity, as a legal term employed, for instance, by the Greek Council of State, and as an analytical term which opens the legal to the socio-economic. The normative content of the term, which is found in various instances of the crisis law-making, is coupled with its material content, which points toward social and economic needs and processes and furthers the move from the politico-theological to the politico-economic. Furthermore, the concept of necessity enables the conceptualisation of the unity between norm and exception, as well as the common function of these forms in reproducing not only the power of the state but also a specific regime of property and productive relations. To illustrate this point, necessity will be assessed in its relation to two other concepts, namely ‘reason of state’ and ‘general interest’. It will be further argued that ‘necessity’ also points towards the ‘content’ that determines the change in ‘forms’, which is located at the level of intensification of socio-economic contradictions.

To begin with, this modern conception of necessity can be traced back to the medieval concept of the ‘raison d’état’. In the concept of the ‘raison d’état’, securing the life of the state is the ultimate necessity, as it pre-exists and serves as the foundational *ratio* of the legal rule itself. The concept of ‘reason of state’ is significant to grasp the inextricable link between necessity and normality and not only between necessity and exceptionality. For Giorgos Karavokyris, normality and exception are underlined by the same fundamental necessity, which gives birth to different forms of exercise of public power. He attributes to Kantorowicz the analysis of the continuity between normality and crisis-exception, which the concept of necessity captures (Kantorowicz, 1997, pp. 284-285). Kantorowicz reveals the inextricable link between necessity and law, and the way in which an exceptional situation turns into a new normality, in the example of taxation: how it turned from exceptional to constant necessity, a *perpetua necessitas*.

What is considered ‘necessary’ according to the ‘reason of state’ is not limited to exceptional cases and emergencies. Rather than being something exceptional, the reason of state is generally built into the institutional structures and deeply embedded within the everyday working life of the modern state (Poole, 2015, pp. 5-6). It operates on a slightly less dramatic plane -war, diplomacy, safety, security- which in common law jurisdictions is understood under the concept of ‘prerogative powers’. In fact, the concept of ‘necessity’ characterises both the form of the exercise of these powers -necessary to safeguard the continuity of the state- which exempts them from judicial review, as well as the issue of the limitation of these power to the extent strictly ‘necessary’ to a democratic society through the mechanism of ‘proportionality test’.

Therefore, necessity understood through the concept of the ‘reason of state’ is not just about emergencies, but also about laws justified as emergency measures which appear as part of the normal legal framework (Poole, 2015, pp. 4-5). It is in that manner that ‘necessity’ is crucial for analysing the ‘exceptional’ legal form of the Memorandum and its ‘necessary’ measures, in the context of the Greek crisis legislation. In general, necessity is crucial in order to analyse the new forms of exercise of public power originating in ‘exceptional’ circumstances. As Bonnie Honig puts it in the context of American liberal democracy, emergency politics occasions the creation of new administrative powers and the redistribution of existing powers of governance from proceduralised processes to discretionary decisions, from the more proceduralised domains of courts and legislatures to the more discretionary domains of administrative agency (Honig, 2009, p. 67).

In the context of our analysis, the crisis legislation is characterised by this move from parliamentary procedures to the more discretionary domains of executive decision-making. In particular, the crisis legislation in Europe after the financial collapse of 2008 is characterised by the ‘conflict’ between technocratic decision-making and democratic decision-making. The legal form of the Memorandum will be examined in this context, as an example of highly discretionary and relatively unaccountable decision-making, which has nonetheless been incorporated in the Greek legal framework in perfect constitutional terms. It is argued that in order to grasp this change in the form of exercise of public power, the ‘unity in difference’ of normal and exceptional forms has to be conceptualised, as well as what is that necessitates the change in form from one to another.

As will become clear in the following sections on a jurisprudential basis, one could argue that the legal form of the Memorandum was necessitated by the ‘general interest’. Let us then look at this concept, through which the appropriate measures for the securing of the state’s life are dressed in the gown of legality and constitutionality (Karavokyris, 2014, p. 200). The idea of the general interest can be traced back to the Roman maxim of *salus populi suprema lex esto*. This phrase appears in ‘The Laws’ of Cicero as part of an ideal constitution embodying the principles of the uncorrupted Republic. When faced with a violent threat to the security of the republic, the Senate was to designate the consuls as supreme military commanders and authorize them to take any measures they thought necessary to counter the threat (Poole, 2015, p. 1).

The state assumes an exceptional form to protect the ‘safety’ and the ‘welfare’ of the ‘people’. We have already analysed the legitimating role of the concept of the ‘people’ in the liberal democratic state and we have encountered the questions related to the impossibility of the generalisation inherent in this and related concepts (such as ‘general will’) in a class-divided

society. It is pertinent now to look at G. W. F. Hegel's analysis of the institution of 'Notrecht' in order to critically assess this concept of 'general interest' and 'salus populi'. Doing so, we will arrive at a dialectical understanding of necessity, unearthing the social content behind the unity of normal and exceptional forms.

One could argue that Hegel's dialectical -i.e. many-sided- but idealist analysis is already 'turned on its head' at the point where he discusses the institution of the 'Notrecht' (i.e. 'right of need'). There, he reveals and emphasises upon the contradictions of property and propertylessness. For Hegel, an illegal action, such as theft, which infringes upon the right of property, may be justified on the basis of the institution of 'Notrecht'. The Notrecht is the right of extreme need, which can be invoked by a person who finds himself in a dire situation of propertylessness, such that his very existence is put in danger. Then, his right of need, his absolute right to his life, trumps the one-sided right of property.

Hegel sees the contradictions of modern civil society and its property regime as the social context which necessitates the appearance of such legal institution. His analysis is juxtaposed to those of Kant and Fichte, for whom the Notrecht is only related to exceptional situations; the 'Not' stems from a natural catastrophe and from an accidental event and cannot question the existing legal system, let alone the social formation in its totality (Losurdo, 2004, p. 157). On the contrary, Hegel argues that the Notrecht is not to be confused with the *jus necessitatis* that refers to exceptional circumstances generally caused by natural disasters. The 'Not', i.e. the extreme need that causes the Notrecht is a *social issue* and refers to *conflicts and concrete clashes brought on by the existing social relationships*.

Additionally, the Notrecht is not to be confused with the *jus resistantiae* which we find in Locke. Locke's right to resistance is directly linked to the inviolability and fundamental role of property in civil society; an individual's property is more inviolable than his own life<sup>32</sup>. For Locke, tyranny is the violation of private property and it is lawful to resist that tyranny: this is the essence of Locke's right to resistance. On the contrary, Hegel's Notrecht is the 'right of extreme need' of those who risk starving to death; not only do they have the right to steal the bread that will keep them alive, but the 'absolute right' to transgress the right of property, that legal norm which condemns theft (Losurdo, 2004, p. 87). Hegel prioritises the right to keep oneself alive, if

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<sup>32</sup> '[The] preservation of the army, and in it of the whole commonwealth, requires an absolute obedience to the command of every superior officer, and it is justly death to disobey or dispute the most dangerous or unreasonable of them; but yet we see, that *neither the sergeant, that could command a soldier to march up to the mouth of a cannon, or stand in a breach, where he is almost sure to perish, can command that soldier to give him one penny of his money*' (Locke, 1960, p. 362).



found in a state of extreme poverty due to socio-economic contradictions over the abstract right to property.

Crucial points for the analysis of the form of exercise of public power can be derived from the above examination. So far, necessity has been identified with the fundamental need of the state to reproduce its rule and the objective need of reproducing a regime of power, property and productive relations. On the contrary, Hegel presents a different ‘necessity’: a Not (need) as the need of man to feed himself; a necessity, therefore, which threatens, contradicts and, in fact, violates the property regime that the necessity we encountered so far functions to reproduce. In fact, this concept of necessity could serve as basis for the social rights of the exploited classes, which are under attack by crisis legislation.

Consequently, we arrive at two fundamentally different contents of the concept of ‘necessity’. To put it in different terms, Hegel reveals that in a class divided society which develops through contradictions, the ‘*salus populi*’ can be as validly interpreted as necessitating the *protection* of private property, as much as necessitating the *violation* of private property. Furthermore, these two conflicting conceptions reflect the social contradictions which give rise to them, and consequently, the conflicting social interests between the propertied classes and the propertyless. The social-class contradictions between propertied and propertyless, exploiters and exploited, cancels out the generality of the concept of people and general interest.

This dialectical understanding of ‘necessity’ does not refer to ‘general interest’ and ‘public welfare’ but to what is *necessary* for the reproduction of a regime of capitalist relations. Necessity is thus understood as ‘relative’ to class position. For instance, -and this is where Hegel’s *Notrecht* is important in this context- for the poor, necessity translates into theft, in order to satisfy the absolute right of keeping oneself alive; on the other hand, for the rich, necessity translates into the protection of property at any cost. In the same manner, in the context of the Greek crisis legislation, for capital -and, legally, from the standpoint of the Greek Council of State-, necessary is the legislation which enables conditions of intensified exploitation through the deregulation of the labour market; whereas for the working class and popular strata, necessary is the contestation of these aggressive capitalist policies relations.

The above dialectical analysis helps us move beyond necessity as a legal term and unearth the social and economic content of the term. Behind its legal façade, the relativity of the content and its contingent nature are revealed. Necessity is a relative concept to the extent that it assumes a different content on the basis of the different ideological positions and class standpoints held by its interpreter. Additionally, the content it assumes is contingent upon the intensification of social

and economic contradictions, as will become evident in the third part of this chapter. We will see there that the content of the ‘necessary’ measures introduced with the Memoranda in the Greek legal system -and throughout Europe- is contingent upon the intensification of contradictions.

The dialectical conceptualisation of necessity, based on the institution of *Notrecht*, enables two things: on the one hand, to see the unity between the normal and exceptional forms; on the other hand, to examine the reasons for their difference. Norm and exception are to be examined in their ‘unity in difference’. Firstly, if a formal and positivist enquiry can identify that the state of exception secures its negation (i.e. the legal order of normality), a dialectical analysis reveals that the fundamental necessity is to be found not in the self-perpetuation of the state as an abstract entity, but in the perpetuation of a regime of property and productive relations, wherein the continuity of the State’s power is of vital importance.

Therefore, it is argued that the same necessity underlies both norm and exception: the necessity of securing the reproduction of the objective legal order, as a vital element for the reproduction of a specific regime of property and productive relations. The normal and the exceptional forms correspond to different concrete historical socio-economic situations, but they both serve the primary goal of perpetuating a property regime which is based on a certain mode of production; the individual ownership of the means of production, the foundation of the capitalist mode of production, is the primary goal that must be safeguarded. Through a series of mediations by the bourgeois state and law, this is the primary necessity which both juridical normality and juridical exceptionality serve.

However, the fact that both forms serve the primary goal of perpetuating a property regime does not mean that they are the same. The ‘rule of law’ cannot be reduced to arbitrary power (Thompson, 2013, p. 263). Normality and exception as forms correspond to different concrete historical situations, i.e. to different levels of intensification of social contradictions. Both norm and exception serve the purpose of reproducing the property and productive relations, but with different means and in different circumstances, the specificity of which has to be taken into account for the change in form to be explained. Therefore, the content which determines the change in forms is located in the concept of class struggle.

### III. The Weimar state form

In the following sections the focus shifts from the more general dualism of normal and exceptional form, to the more concrete dualism of Weimar and Nazi state form. The fundamental differences and nuances between the ‘normal’ and the ‘exceptional’ forms of exercise of public power is the point of departure of this analysis. The Weimar Republic is not the same with the Nazi state. This is precisely the point: they correspond to different levels of intensification of social antagonisms. The German Revolution of 1919 was defeated, but the German working-class struggle won concessions, vital concessions, in the form of civil, political, and social rights which were enshrined in the Weimar Constitution; concessions which are captured in the form of the Weimar-welfare state and were abolished in the form of the Nazi state.

But in order to comprehend why these concessions were so easily abolished we have to figure out what is common in the two forms. What relations were reproduced by both the Weimar and the Nazi state? What social movements were prevented by both? The central argument put forth in the following analysis is that only if we understand what is common in the two forms and what necessitates the change from one to another can we comprehend the intimate relation between form and content. Ultimately, it is argued that Weimar is an example of how the constitutional form (the *corporate-welfare* form of the Weimar constitution) could neither contain nor withstand the capitalist antagonisms and contradictions it overlaid.

In order to pursue this argument we will begin by outlining the main characteristics of the Weimar state form. Originating in the context of highly intensified contradictions, the Weimar constitution was an example of the move from an individualist to a more corporate<sup>33</sup> model of constitutionalism, performing two important and interrelated functions, i.e. the constitutionalisation of labour law and the introduction of measures of ‘economic democracy’. However, despite the declared intentions of its authors to combat the imbalance between capital and labour, inherent in capitalist relations, the roots of the imbalance, located in the private ownership of the means of production, persisted. Therefore, in spite of its progressive nature, the Weimar constitution ultimately served to reproduce the capitalist relations of production by performing (objectively, even though not consciously at all times) three very important functions: demobilising the labour movement; promoting policies of class collaboration; and promoting an ideology of non-radicalism. These functions will be examined in the next section.

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<sup>33</sup> For the purposes of the following analysis corporatism refers to the state model which is based on the one hand on the political principles of ‘national sovereignty’, and on the other on the socio-economic principles of collaboration of the various classes engaged in production (see (Pitigliani, 1933)).

Let us begin the analysis of the main characteristics of the Weimar form by setting out briefly the context in which it came to being. After the end of World War I and Germany's defeat, an intensified economic and socio-political crisis broke out in the country. In November 1918 many German cities were the locus of armed insurgencies, which led to the overtaking of governmental buildings and the declaration of soviet (workers' councils) rule, while a revolutionary government was formed, which ruled over a substantive part of the country. After a series of conflicts, in January 1919, the armed militia of the workers were defeated and Karl Liebknecht and Rosa Luxemburg, the leaders of the Spartacists, were murdered by the Freikorps.

The Weimar Constitution must be assessed in this context, as the Constitution of a bourgeois state in the need to reproduce itself in the face of multi-level threat. The public legal form is assessed in its unity with the socio-economic and political context; and the Weimar form was assumed by a bourgeois state in need of reproducing itself. The Weimar Constitution, which crystallised a new form of bourgeois State, can be seen as the German ruling class's response to the proletarian revolution: a state not indifferent to the movement of economy; a state that does not recognise as its subject only the private citizen, but also the members of the exploited classes, which it seeks to include in its provisions.

It has been argued that the authors of the Weimar constitution were occupied with one vital question in the context of intensified contradictions: 'how can the welfare state and liberal democracy be successfully reconciled' (Neumann, 2009, p. 95)? How can the bourgeois state form be reproduced, without shedding its main characteristic of reproducing capitalist social relations, while recognising the rights of labouring classes? The novelty of public legal form in the case of the Weimar state is that it does not only abstract from the socio-economic content; it recognises the existence of classes, as well as social rights and benefits for the dominated, exploited classes.

So, the defeat of the working-class revolution and the Spartacist uprising in Germany led to constitutional change in the form of a progressive, substantive constitution which recognised classes and not only individuals. It is worth noting that this novelty enhanced the state's appearance as a neutral, relatively autonomous, agent contributing, thus, vitally to its ability to mediate social conflicts and reproduce the regime of power, property and productive relations. The Weimar constitution was, thus, from the beginning erected upon hardly irreconcilable contradictions which it sought to contain. It sought to preserve the basis of the German capitalist social formation, i.e. private ownership, while recognising the existence of dominated classes and incorporating rights pertaining to the latter. In its form it combined the formalist elements of constitutions theretofore, with substantive socialist elements.

The Weimar constitution, by undertaking a peculiar synthesis of individualistic and collectivistic elements, afforded legal protections for social groups and interests, because of the deep conviction of the Weimar's founders that a compromise-oriented collective democracy represents the political form most appropriate to class-divided mass democracies. For the main constitutional theorists who wrote in support of the Weimar constitution -like Hugo Sinzheimer, Ernst Fraenkel, Franz Neumann and Otto Kahn-Freund<sup>34</sup>- Weimar undertook the task of 'giving the quest for social parity a possibility of succeeding, by providing extensive possibilities for new, decentralised forms of economic democracy and interest group representation' (Scheuerman, 2000, p. 100). Labour courts and labour councils making worker participation in the economy an everyday reality were the most important manifestations of this tendency. The organisation of labour relations within Weimar took on increasingly collective form insofar as organised groups play a growing role in it (Scheuerman, 2000, p. 100).

The quintessential constitutional provision, which crystallised this tendency and formed its basis, was Article 165 of the Weimar Constitution. Article 165 called workers, 'to participate, in community with the employers and with equal rights, in the regulation of wages and conditions of employment as well as in the overall economic development of the productive forces'. Capital and labour were called to cooperate in the organisation of the economy from an equal footing, cementing the formation of a corporate state form. The Weimar state form is an example of a corporate state form focused on class collaboration. In fact, as Franz Neumann's analysis of the structure of the Weimar Republic shows, the role of the pluralist doctrine of the Weimar Constitution was to turn class struggle into class collaboration. The ideology of the Catholic Centre party was to become the ideology of Weimar, and the Centre party itself, with a membership drawn from the most disparate groups -workers, professionals, civil servants, handicraftsmen, industrialists, and agrarians- was to become the prototype of the new political structure. Compromise among all social and political groups was the essence of the constitution. Antagonistic interests were to be harmonized by the device of a pluralistic political structure, hidden behind the form of parliamentary democracy (Neumann, 2009, pp. 9-10).

Integral aspect of this corporate form is the issue of constitutionalisation of labour relations, so that collectivized labour might participate with capital, on a parity basis, in the autonomous regulation of the economy (Dukes, 2008, p. 341). Labour law was conceived as paradigm of a

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<sup>34</sup> Ernst Fraenkel, Franz L. Neumann, and Otto Kahn-Freund were apprenticed to labour law under Sinzheimer in the early 1920s. [...] All three can be said to belong to the Weimar generation in the fullest sense, the cohort who came of age in the Republic. In addition to their common relationship to Sinzheimer, they were united by membership in the student wing of the Majority Socialist Party and by ties of personal friendship (Kettler, 2005, p. 4).

disruptive and transitional structure, serving to hem in at least some of the powers of property, as well as providing a strategic framework for cumulative measures to enhance the benefits and powers of labour (Kettler, 2005, p. 9). In that manner, labour law was linked to the issue of economic democracy. This notion was based on the idea that democracy had to extend to economic as well as political relations. The democratisation of the latter alone left the majority of the population, the manual-working wage earners, unemancipated. For this reason, measures of economic democracy, such as collective bargaining, serve to ameliorate the position of labour with regards to capital. But, by not negating the foundational premise of the disadvantageous relationship for the working class, these measures remain contingent upon the intensification of capitalist contradictions, which will render them burdensome and redundant. Let us elaborate by looking more closely at the work of Hugo Sinzheimer.

Hugo Sinzheimer, as a professor of law and sociology, was responsible in large measure for the theorization of German labour law, and as a parliamentary representative for the Social Democratic Party (SPD), he was directly involved in drafting the Weimar constitution and labour statutes (Dukes, 2008, p. 345). Moreover, his ideas were of influence again after the Second World War, because the labour law of the Federal Republic of Germany retained much from Weimar law -of course his influence was to exceed the boundaries of Germany because of the spreading of welfare model. For Sinzheimer, labour law was a tool to be manipulated to right the injustices inherent in the capitalist mode of production: the subordination of labour to capital and the subordination of the individual employee to the employer (Dukes, 2008, p. 345). According to him, an imbalance of power between capital and labour ('property' and labour, as he termed it) was inherent in the capitalist mode of production<sup>35</sup>. He thus proposed the adoption of an economic constitution, which was necessary in order to adjust this imbalance in favour of labour, and to put an end to the subordination of labour to capital, so that labour might participate in managerial decision-making on a parity basis with capital (Dukes, 2008, p. 345).

This brings us to the root of the problem with Sinzheimer's conception and the contradiction between Weimar's proclamations and the eventual failure to meet them. The question that Weimar and its supporters failed to ask is 'what is the reason for the imbalance of power between capital and labour'. This is the key to understanding how the balance might shift in favour of labour. What is the origin of the inequality in bargaining power, if not the issue of ownership of

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<sup>35</sup> Similar views were expressed by another major exponent of Weimar's social constitution of labour. Otto Kahn-Freund recognised the existence of a conflict, inherent to any advanced industrial society, between the aims of management and those of labour, involving the matter of the distribution of the profits of an enterprise: management's priority is to maximize investment, and labour's is to maximize consumption (Dukes, 2008, p. 353).

the means of production? Sinzheimer manifests a decidedly non-Marxist understanding of the functioning of the capitalist system<sup>36</sup>. Capitalist relations of production are based on the subordinate position of labour with regards to capital. Capital as a social relation cannot be established and reproduce itself, if not on the basis of a fundamental contradiction between the private ownership of the means of production and the socialisation of the labour process.

Leaving the issue of ownership of the means of production untouched necessarily means that the main premise, upon which the capitalist exploitative relations are erected, is sustained and reproduced. If capitalist ownership of the means of production is taken for granted, then the conflict between capital and labour is ineradicable, and it is a matter of containing it and reproducing it. But, the reproduction of the capitalist system of contradictory relations eventually leads to the demise of the welfare-corporate form, once it can no longer accommodate conditions of intensified exploitation. The reproduction of the fundamental capitalist premise means that generally -not only in mid-war Germany but also in post-war western world- labour law and the welfare state form remains as long as it serves the interests of the ruling classes.

The (welfare-corporate) Weimar form aims to right the injustices inherent in capitalism, but not in an absolute manner. It fails to address the core issue of production of wealth, productive relations and ownership of the means of production. It merely addresses the epiphenomenal issue of distribution of wealth, exchange relations and negotiations<sup>37</sup>. Labour regulation presupposes capitalist ownership and class-division/exploitation while seeking to ameliorate its effects. The fundamental basis of German capitalist social formation, i.e. private ownership, was preserved. Democratic input in decision-making did not threaten it, even though it ameliorated some of its effects on labouring classes.

What is more, the reproduction of the fundamental condition of capitalist relations posed limitations on the effective implementation of measures entailed by Article 165. Let us make a

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<sup>36</sup> Sinzheimer's superficial understanding of Marxist theory is manifested in his representation of Marx's social categories as ontological ones: 'Capital is the material basis of human life, it belongs to the world of 'things', that have themselves no purpose, but are designed to serve as means to human ends. Labour is the personal basis of human life, it belongs to the world of spiritual beings, that have their own purposes, and are not designed to serve as means to the ends of others' (see H. Sinzheimer, *Grundzüge des Arbeitsrechts* (1927) 8, as referenced in (Dukes, 2008, pp. 345-346)). The above passage displays a rather confused understanding of Marx's analysis of capital, as it bypasses Marx's fundamental insight that capital is not a thing and, thus, does not belong to the world of things; capital is a social relation and it needs labour to remain in a subordinate position, so as to contribute to the contradictory processes of value creation and capital accumulation.

<sup>37</sup> Even though, arguably, labour legislation deals with the production process itself, by regulating, for instance, the limits to the working-day and other conditions for the consumption of labour-power. Nevertheless, the working-day can be limited in case of capitalist policies which favour the extraction of relative surplus value with emphasis on technological innovation and reducing the socially necessary labour to produce a use-value, but this is not the case in a system based on absolute surplus value where the need for profitability is addressed by extending the working-day and intensifying the exploitation of the labour-force. We will return to this point in the discussion of the Nazi state form and the reasons that led to it.

brief point with regards to the system of councils. The call of Article 165 'to participate in the regulation of wages and conditions of employment' meant practically that a system of councils would be formed: industrial councils and workers' councils. The goal for these industrial councils was to put an end to the unilateral decision-making power of management in production matters. In this manner they were an essential aspect of extending democracy to economic relations. But their function would be restricted to the economic sphere. They would not act to replace parliament (as under the soviet form of government in place in Russia at the time); they would be organs of economic, not political, democracy (Dukes, 2008, p. 349). In addition to the industrial councils, workers' councils would be formed to represent the workers' interests at workplace level (Dukes, 2008, p. 349).

On the basis of the above, two points have to be made to show the limited power allowed to the progressive and labour-friendly aspects of the Weimar form by the reproduction of capitalist relations. The first concerns their role which is limited to economic affairs. Industrial and workers' councils are not to act as political institutions or vehicles of radicalization. This is their fundamental difference from Russian Soviets or the short-lived workers'-councils of the 1919 Revolution. Article 165 councils are not autonomous, but merely parties to negotiations, members of a 'community'. The defeat of the 1918 revolutions was reflected in a council-system based on class collaboration, which was entirely different from the working-class institutions following the victory of the revolution in Russia, where the slogan 'all power to the soviets!' (Вся власть советам!) was used to oppose the bourgeois government of Kerensky. The second point concerns the non-implementation of several aspects of the economic constitution. Statutory provision was made for the establishment of trade unions and works councils, but no district-level workers' councils and no industrial councils were ever formed (Dukes, 2008, pp. 349-350). Resistance in the private sector, together with disagreement within the SPD, meant that the economic constitution as Sinzheimer envisaged it was never fully achieved. Article 165 was never fully implemented and this was to a considerable extent due to the reproduction of the capitalist regime of power, property and productive relations.

#### IV. Contradiction and reproduction

Apart from the reproduction of private ownership, or, rather, for the purpose of it, the Weimar form was characterised by a certain hostility towards the radicalisation of class struggle. This is what this section explores. As we said above, the roots of the imbalance of power between labour



and capital were not fully addressed by the Weimar system, as this would involve a revolutionary strategy of the working-class movement, which would contest the foundational basis of the capitalist regime. On the contrary, the Weimar form through social reform, captured in the notion of 'economic democracy' and the project of 'constitutionalisation of labour relations', sought merely to ameliorate the imbalance and to contain the contradiction between labour and capital. The result was the deflation of the labour movement.

What follows concerns the important question which is constantly encountered by the working-class movement: social reform or revolution? In fact, it has been argued that where Sinzheimer and his followers broke with Marx, and with a number of his fellow members of the SPD, was in their belief that social justice and democracy could be achieved within the confines of the parliamentary system, through the extension of democracy from the political sphere to the economic sphere, i.e. through the constitutionalisation of industrial relations (Dukes, 2008, p. 347). The social-democratic characteristics of the Weimar form are to a certain extent a manifestation of this particular tendency in the labour movement: a tendency which rejects the revolutionary road for a more 'evolutionary' path of social reform through the introduction of socialist policies in the bourgeois parliament. This is a highly contested issue, yet an issue of greatest importance with regards to the strategy of working-class parties, which has shaped the historical role of these parties for the last hundred and fifty years.

Writing in a more recent context and arguing for an alternative to parliamentarism, Istvan Meszaros has warned against the corrosive effects caused by the full conformity of the various working class representatives to the 'rules of the parliamentary game' (Meszaros, 2010, p. 11). In particular, Meszaros refers to Rosa Luxemburg and her warning against the 'theoretical and political vacuity of the unfulfillable 'evolutionary' prescriptions': 'parliamentarism provides the soil for such illusions of current opportunism as overvaluation of social reforms, class and party collaboration, the hope of a pacific development towards socialism, etc' (Meszaros, 2010, p. 14). For Luxemburg -and Meszaros- parliamentarism aims at dissolving the class-conscious sector of the working class into the amorphous mass of the mythical 'electorate'.

We can never be certain about the aims of parliamentarism, but its result in the context of mid-war Germany has been argued to be the dissolution of the most active and class-conscious sector of the labour movement. This conclusion seems to have been shared by Sinzheimer and his disciples, who, towards the end of the Weimar period, concluded that their labour law was in a mortal crisis, 'primarily because *the labour movement had compromised its freedom of action by reliance on state agencies to compensate for its lessened bargaining power* in a declining and ever more controlled economy' (Kettler, 2005, pp. 5-6). However, instead of abandoning their

reformist position on the basis of this conclusion, they argued for further reforms, as they hoped to counteract the combination of negative objective conditions and deficient organisational capacity, 'by mobilising support for changes in economic law to weaken the positions of the cartels and monopolies they believed to be in command' (Kettler, 2005, pp. 5-6).

The exception was Franz Neumann who saw their sustained efforts in these directions as a function of 'naive idealisation of the supposedly neutral state and its legal forms' (Kettler, 2005, pp. 5-6). Therefore, the point could reasonably be made that the two main characteristics of the Weimar period, namely the social policies of the Republic, which notably improved the abysmal conditions and servile status of the working population, on the one hand, and the failure of the Social Democrats to muster the political will and organisational resources to fight the Nazis, on the other, have to be seen as necessarily connected. The priority assigned by the main working class organisations to the 'social gains of the revolution' exacted a heavy cost in organisational energy, bureaucratisation, and the demobilisation of memberships (Kettler, 2005, p. 2).

If the argument can be made that the Weimar social policies played a role in deflating the working-class movement by enhancing the latter's reliance on the bourgeois state, it is essential, for our purposes, to look at the specific characteristics of the Weimar Constitution which might have contributed to this function. Emphasis will be put on the notion of 'works community', a manifestation of the corporate form of the Weimar Constitution and of the principle of class-collaboration. We saw above that the Weimar constitutional form was progressive in not only abstracting from the social content, but in recognising the existence of social classes, as well as in providing for benefits for the labouring, dominated classes. In pursuit of the goal of social parity, workers were 'called into community' with employers. This 'works-community' was constitutionally enshrined in Article 165.

As envisaged by Sinzheimer, the community of labour and capital under the economic constitution was a 'community of management' and not a syndicate. As we saw above, the sphere within which labour acted from a position equal to that of property, and within which matters fell to be decided by labour and capital together, acting in community, extended *to cover the power to manage*, inherent in capital, *but not the matters of ownership or exploitation* (Dukes, 2008, p. 348). It is argued that the notion of the community formed a constitutive fiction of the Weimar corporate constitutional form. In this public legal form, the individual persons, whose wills constitute the primary legal relationships in liberal legal systems, are replaced by members of constituted communities, whose legal claims and duties somehow derive from the objective character of those communities (Kettler, 1984, p. 278).

Therefore, in the Weimar form, one fiction gives way to another, as contract is displaced by status, and free legal subjectivity is displaced by the objective legalities supposed to inhere in the organic works-community (Kettler, 1984, p. 278). The legal fiction of the works-community is a constitutive aspect of the Weimar form, as it concretises its corporate characteristics by moving beyond the abstract formalism of previous constitutional forms. At the same time this fiction promotes the principle of class-collaboration by replacing the irreducible conflict between capital and labour with the image of a community. This fiction plays, thus, an essential role in the reproduction of the capitalist relations of exploitation by obscuring the fundamental division between capital and labour, and promoting the idea that this division can be turned peacefully into a community of goals.

It is then easy to see how, despite the declared intentions of the Weimar social theoreticians, the notion of the works-community could be appropriated by bourgeois institutions. As a matter of fact, the reactionary potential of the notion was manifested in the Weimar courts' labour law jurisprudence, where the relationship between workers and entrepreneurs was construed in numerous cases as association in a works-community (*Betriebsgemeinschaft*), having a common works-objective (*Betriebszwerk*) which imposed privileges and obligations on the participants (Kettler, 1984, p. 279). The courts' jurisprudence during the Weimar period moved from an individualistic to a corporate conception of social and, in particular, labour relations:

*'The individualistic point of view which was determinative of employment relationships at the enactment of the German Civil Code cannot claim today the significance which it had at that time, because the idea of a social labour-and-works-community has in the meantime been recognized and established in legislation as well as in juristic science'* (Reichsarbeitsgericht decision of June 20, 1928, as quoted in (Kettler, 1984, p. 282).

The works-community and community ideology replaced the individualistic point of view. As a legal-ideological form the works-community responded to intensified class-antagonisms. In fact, in the period of labour activism after the First World War, the courts confronted a series of cases in which they were asked to decide which principle applied where the performance of the employment contract is rendered impossible by the effects of labour conflicts (e.g. strike) in which the claimant for wages is not directly involved (Kettler, 1984, p. 281). According to the older system, laid out in section 615 of the imperial civil code, the employer, as the owner, had to bear the full risk involved in the operation of his enterprise. So, according to the imperial system, every employee who offered his labour to an employer should receive wages even when the latter was unable to let him work either because of technical mishaps in the factory, or because of economic conditions or a strike in another factory (Neumann, 2009, p. 420).

This statutory provision was reversed by the federal Supreme Court in 1921. The court argued that the establishment of works-councils had created a works-community in which the employee was a 'living link' and therefore had to share the risks (Neumann, 2009, p. 420). Lower courts were advised to examine the equity in each specific case: if the disturbance is caused by strikes, for example, the employer is not obligated to pay wages even if the stoppage occurs in a wholly unrelated enterprise (Neumann, 2009, pp. 420-421). The practical effect of this doctrine is that the workers' unions would have to reach an agreement with the employees' unions in every strike so as not to be considered in breach of their employment contract. This led Franz Neumann to the conclusion that 'the plant-community theory was nothing but an anti-democratic doctrine by which the judiciary sabotaged progressive labour legislation' (Neumann, 2009, p. 421). Unable to find a single decision by the supreme labour court that substantially improves the protection of the worker by invoking the community ideology, Neumann argues that the works-community, between employer and employees, was a community of losses but never of profits.

Consequently, there are two general points that can be made with regards to the notion of the 'works-community'. The first is that intensified class-antagonisms shaped law's response, and law -in the form of the principle works-community- responded to ameliorate these class-antagonisms and fulfil its central function in reproducing the capitalist regime of power, property and productive relations. The second is that the move from the individualist to the corporate form does not necessarily favour the labouring classes, as long as the capitalist relations of exploitation are reproduced. A third point, which can be raised to foreshadow the analysis of the following sections, is that -as Neumann points out- the notion of the works-community, by ignoring the fundamental social divisions between labour and capital, provides a central ideological theme for the National Socialist legislation on the organization of national work (Kettler, 1984, p. 279).

Sinzheimer himself was opposed to the notion of works-community as employed by the courts. But the general ideological effect of the notion and the way it was employed, as well as the effect it had on working-class consciousness and consequently on the organisations of the labour movement, cannot be ignored. The constitutive fiction of the works-community was a manifestation of the general principle of class-collaboration which permeated the corporate Weimar form, and had the objective effect of demobilising the labour movement. In that context, Franz Neumann's account of the Weimar form seems accurate.

For Neumann, the social constitution comprising collective bargaining, self-administered health and social insurance, works committees, labour courts, and the other achievements of Weimar was 'a function of a complex of bargains between conflicting social forces and operated as long as these forces were at least approximately in balance' (Kettler, 2005, p. 11). Neumann puts

emphasis on the progressive -and positive for the labouring classes- aspects of the Weimar state form: there is no question that these enhanced the dignity of labour because they limited the powers pertaining to capital in several important dimensions. But, this form could only be sustained as long as these forces were 'at least approximately in balance'. And the fact that the roots of the imbalance of power (i.e. the issue of private ownership of the means of production) were reproduced and never fully addressed meant that this balance was bound to be short-lived.

The reproduction by the Weimar form of the main contradiction of capitalism (i.e. the contradiction between the socialisation of the productive process and the private ownership of the means of production) meant that the state had to shed its skin and assume a new form, as soon as contradictions were intensified. This will be the subject of the following sections. What is more, the demobilisation, which came as a result of the constitutive fictions and illusions sustained by the Weimar form, led to there being no resistance when the form had to change. According to Neumann, the progress of monopolisation in the economy -i.e. the intensification of socio-economic contradictions as we put it- meant that the conditions making for parity eroded. Moreover, the labour movement became ever more dependent on the support of governmental agencies with their own ideological and practical reasons for accommodating labour, with the result that they became organisationally adapted to these ties and estranged from their members. So that when the reactionary alliance took full control of the governmental agencies, the labour movement had lost the will and ability to put their full effort in the political struggle (Kettler, 2005, p. 11).

On the basis of the above, it could be argued that the demobilisation of the labour movement was not coincidental, but rather the result of a more generalised hostility towards radicalism. A brief, auxiliary -albeit not necessarily generalisable, yet certainly characteristic of certain social-democratic tendencies and their corrosive effect on the labour movement- point on the hostility of one certain Weimar theoretician towards radicalisation is pertinent here. Ernst Fraenkel<sup>38</sup> writing in 1971 on the theoretical legacy of Hugo Sinzheimer, and in support of his categorical hostility to the movements of the New Left, focused on the issue of 'council mythology' -which he took to be the central theme of the New Left radicalism. Fraenkel portrayed Sinzheimer as the man who rescued the authentic reform movement of German labour from the wild and self-defeating

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<sup>38</sup> 'Fraenkel had taken a strong stand against the Communists during his years as occasional contributor to the socialist exile press in America, and his post as post-war governmental advisor in Korea ended with the forced evacuation of Seoul at the onset of the Korean War. Fraenkel came to Berlin, among other things, as an unembarrassed medium of the American campaign against Communism, and his objectives, clearly stated in the reports to American authorities entailed by his contractual status as consultant for political science between 1951 and 1953, prominently included his efforts to rouse labour organizations against the East' (Kettler, 2005, p. 14).

gestures of the council movement, imbued with delusions about the Russian soviets (Kettler, 2005, p. 15).

For Fraenkel's Sinzheimer, the workers' council movement, bred up by disorientation and agitation, demanding a dictatorial regime of workers' power, posed a threat to the 'multi-dimensional settlement' of the Weimar form. Sinzheimer was able to extract a reasonable kernel out of the council excitement, transmuting the idea into an element within a 'social constitution' comprised of, trade union responsibility, labor-management parity, and a regime of negotiations, alongside of the ultimately sovereign democratic parliamentary order (Kettler, 2005, p. 15). This conception was then embodied in the Weimar Constitution, and, in particular, Article 165.

Consequently, it can be argued that the ideological framework of Art. 165 of the Weimar Constitution, apart from the prioritisation of the principle of class-collaboration and for the purpose of containing the class-struggle, manifests a certain hostile position towards the autonomous working-class movement. In that manner it is not entirely incompatible with Article 48 and the state of emergency. The Weimar constitution is a progressive constitution with social-democratic elements to promote the dignity of the laboring classes, but it is still a bourgeois constitution. And this fundamental characteristic is expressed not only in its promoting of class-collaboration and the objective effect of demobilizing the labour movement, but also in a provision that would allow the ruling class to suspend these fundamental liberties and rights afforded to the dominated classes in the name of 'emergency' (Neocleous, 2006). The German capitalist state assumed the Weimar form in order to reproduce itself in the face of rising contradictions. But the same state, recognising the 'ever-present possibility of conflict', it regulated the cases in which its own suspension will be necessary; it regulated its own exception.

To conclude this section, it is argued that the Weimar Constitution, while providing the labouring classes with hard-earned rights which vitally improved their position with regards to capital, ultimately failed to fulfil its most promising aspects precisely because it reproduced the foundational condition of capitalism, i.e. ownership of the means of production. One would ask then: 'why wasn't this form kept, if it served so well the interests of the ruling class?' To be certain, some characteristics of the Weimar form (such as the principle of class-collaboration and the notion of 'community') remained -albeit in a different form- in the Nazi state form, too. But, the Weimar form served the reproduction of capitalist relations in the face of a working-class revolt; it could not serve the same in the face of the intensified socio-economic contradictions following the Great Depression.

The Weimar State was a pluralist party State, a welfare state, but a capitalist state for that matter. The primary purpose of reproducing the capitalist productive relations was served by the Weimar Republic at the time it was instituted. Generally, labour law and the welfare state form -as introduced not only in Weimar but also in post-Second World War Western world- remains as long as it does not threaten the reproduction of the capitalist regime of power, property and productive relations. If the form threatens this reproduction, it is shed and the state dresses with a new skin. And the Weimar form did threaten this reproduction, since it posed limits to the need of German capital to increase the exploitation of labour. The Weimar form having recognised classes, social rights and benefits for the dominated, exploited classes, could not contain forms of intensified class struggle and reproduce the capitalist relations.

As time went on, it became evident that the welfare state of Weimar countered the interests of the ruling class, until it was negated by the form of the Nazi State. The Weimar corporate state form which focused on class collaboration, through ideological means enabling the conditions of extraction of relative surplus value, was replaced by the Nazi form which through repressive measures imposed compulsory collaboration and ensured the conditions for the extraction of absolute surplus value. Let us now examine how the change in the form took place.

## V. Change in the form of exercise of public power

In mid-war Germany two major changes took place: one relating to the structure of the state and the other to the theory of the state. A period of deep crisis and transformation of the bourgeois State (as the bourgeois state had to confront the antagonism of the first workers' state and the revolutionary threat of internal working-class movement, as well as the socio-economic contradictions of capitalism which reached their peak at the economic crisis of 1929) was bound to be reflected in the theory of the state. The work of Carl Schmitt is a major example of this phenomenon. For this reason, the analysis of the change in the form of public power in the following sections will go hand in hand with a close analysis of Schmitt's theoretical framework. Schmitt's interpretation of these political and constitutional changes is crucial for illustrating our argument on the similarities and differences between the Weimar and the Nazi form (or the 'normal' and the 'exceptional' form).

Let us begin our analysis with Giorgio Agamben's interpretation of the change from the Weimar to the Nazi state form. In a recent essay, Agamben reiterates a position he concluded in one of his earlier works, namely that the Nazi state was in reality a state of emergency that was never

revoked (Agamben, 2015). According to Agamben, since the ‘Decree for the Protection of the People and the State’ of February 28 1933 was never repealed, the entire Third Reich can be considered a state of exception that lasted twelve years’ (Agamben, 2005, p. 2). On the contrary, we argue that a careful reading of Schmitt’s ‘Dictatorship’ together with his ‘State, Movement, People’ prohibits such conclusion being reached. In order to substantiate this claim it is essential to examine Schmitt’s notion of ‘dictatorship’.

Dictatorship is the exercise of state power freed from any legal restrictions, for the purpose of resolving an abnormal situation -in particular, a situation of war and rebellion. Hence two decisive elements for the concept of dictatorship are on the one hand the idea of a normal situation that a dictatorship restores or establishes, and on the other the idea that, in the event of an abnormal situation, certain legal barriers are suspended in favour of resolving this situation through dictatorship (Schmitt, 2013).

This is how Schmitt defines ‘dictatorship’ in the 1926 ‘Staatslexikon im Auftrage der Görresgesellschaft’. There are two issues raised in this definition that the aforementioned concept of necessity helps us grasp. First, that even in exceptional situations it is a very normal need whose satisfaction must be prioritised. So that the state power exercised in dictatorship does not resolve an abnormal situation, so much as meeting a fundamental need of reproducing the system of bourgeois rule. This need determines the existence of this abnormal situation and its ‘ever-present possibility’, a concept which forms the basis of Schmitt’s theory of the exception. The second issue has to do with the difference in the form of exercise of state power, which consists in the suspension of legal barriers. Dictatorship reveals the relation between law and violence, but not violence for violence’s sake; rather a violence determined by the fundamental need of securing class rule and reproducing the relations of production; violence exerted for a specific purpose.

Therefore, according to our reading of Schmitt’s dictatorship as ‘exercise of state power freed from any legal restrictions’, the law poses a limit to state power *only to the extent that state power is not necessary* to intervene to ensure the reproduction of bourgeois rule and capitalist relations of production<sup>39</sup>. It is pertinent now to analyse the two different kinds of dictatorship that Schmitt

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<sup>39</sup> It should be noted here that our reading is based on Marx’s analysis of the change in the form of exercise of bourgeois rule in the ‘18<sup>th</sup> Brumaire of Louis Napoleon’. ‘Thus the French bourgeoisie *was compelled by its class position to annihilate, on the one hand, the vital conditions of all parliamentary power, and therefore, likewise, of its own, and to render irresistible, on the other hand, the executive power hostile to it.* [...] Thus by now stigmatizing as ‘socialistic’ what it had previously extolled as ‘liberal’, the bourgeoisie confesses that *its own interests dictate that it should be delivered from the danger of its own rule; that to restore tranquillity in the country its bourgeois parliament must, first of all, be given its quietus; that to preserve its social power intact its political power must be broken;* that the individual bourgeois can continue to exploit the other classes and to



proposes: commissarial and sovereign. They are both based on the concept of the 'people'. But, whereas in commissarial dictatorship the deputies of the people, acting within the already constituted order, seek to preserve this order by suspending certain legal provisions, in sovereign dictatorship the people's role as a legislator and as a dictator coincides in order to found a new constitution. The exercise of the people's constituent power is the distinguishing element of sovereign dictatorship. Here is how Schmitt describes the relationship between sovereign and commissarial dictatorship:

The legislator is nothing but right that is not yet constituted; the dictator is nothing but constituted power. When a relationship emerges that makes it possible to give the legislator the power of a dictator, to create a dictatorial legislator and constitutional dictator, then the commissary dictatorship has become a sovereign dictatorship. This relationship will come about through an idea that is, in its substance, a consequence of Rousseau's *contrat social*, although he does not name as a separate power: *le pouvoir constituant* (Schmitt, 2013, p. 111).

Two issues follow directly from the above. First, the relationship between dictatorship (exceptional use of power) and the law is always there and never questioned in both dictatorial forms. On the one hand, in commissary dictatorship, it is the exercise of power unrestrained from law which safeguards law itself. On the other, sovereign dictatorship does not appeal to an existing constitution, but to one that is still to come. This is why the concept of 'constituent power of the people' is crucial here; because the 'people' as the carrier of this power relates it to the constitution-to-come as foundational to it. This brings us to the second issue of the ideological function of the 'people'. Both forms of dictatorship are based on the idea of the 'sovereign people'. It is the 'people' that institutes the state with its constitution-making power on the basis of its 'political unity', we read in Schmitt's 'Constitutional Theory'. And it is in the interests of the 'people', i.e. it is in the 'general interest', that this constitutional order is suspended for exceptional power to safeguard it. However, the 'people', this classless and metaphysical subject, is a fiction.

As we concluded in the previous chapters, the concept of the 'people' is an illusory concept, albeit one with very actual effects in a social formation, precisely because it impedes the conceptualisation of society in its contradictory movement by obscuring the conflicting social interests behind the 'oneness' of 'popular sovereignty'. Therefore, both normal and exceptional

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enjoy undisturbed property, family, religion, and order only on condition that their class be condemned along with the other classes to like political nullity; *that in order to save its purse it must forfeit the crown*, and the sword that is to safeguard it must at the same time be hung over its own head as a sword of Damocles'. See (Marx, 2009).

forms are based on the idea of the 'people' (and the accompanying concepts of general will and general interest) as a legitimating fiction of class rule. But, the 'people' as a whole cannot be sovereign because society is divided; the 'people' stands in for a whole which consists of classes with conflicting interests, which cancel the possibility of a 'general interest' expressed in a 'general will'.

Where does this leave us with regards to the nature of the Nazi State? Was it a permanent state of exception? Was it a sovereign or a commissarial dictatorship? In order to answer this question we have to look at Schmitt's celebratory essay on the Nazi State, his 1933 'State, Movement, People'. There, Schmitt refutes the argument that 'the National-Socialist public law has only the value of a temporary, interim measure against the background of the earlier constitution, and that a simple bill passed by the Reichstag might again abolish the new constitutional legislation entirely and return to the Weimar Constitution' (Schmitt, 2001, p. 5).

He argues instead that there are two issues to be taken into account with regards to the Enabling Act (or law of empowerment, i.e. the enabled amendment of the Weimar Constitution that gave the German executive the power to enact laws without the involvement of the Reichstag) of 24 March 1933. First that the elections of March 1933 'were in fact *a popular referendum, a plebiscite*, by which the German people has acknowledged Adolf Hitler, the leader of the National-Socialist Movement, as the political leader of the German people' (Schmitt, 2001, p. 5). According to Schmitt, the 'people' appears here and gives to ordinary elections the character of plebiscite. The '*pouvoir constituant*' and the '*will of the people*' are invoked here by Schmitt to found the Nazi State. And this invocation points towards the concept of sovereign dictatorship with regards to the emergence of the Nazi State. On the other hand, Schmitt emphasises the importance of the fact that this transition should take place legally (Schmitt, 2001, p. 6). The Enabling Act came into legal existence in conformity with Article 76 of the Weimar Constitution which required a 2/3 majority for laws amending the Constitution, but that 'does not mean that one may still nowadays consider the Weimar Constitution as the foundation of the present-day State structure, but only that the law represents a bridge from the old to the new State, from the old base to the new base' (Schmitt, 2001, p. 6).

Here, therefore, the change to the exceptional form is accommodated within the normal-parliamentary form. The Parliament votes with the Enabling Act of 1933 its disempowerment. Here legality becomes its own legitimation, since the transfer of power is carried out according to the laws in force at the time of the transfer, which lend it the needed legitimation. One could argue that the two aforementioned legal instruments, the 'Decree for the Protection of the People and the State' of February 28 1933, passed under the emergency provision of Article 48 of the

Weimar Constitution (otherwise known as the 'Reichstag Fire Decree'), and the 'Enabling Act' of March 24 1933, correspond to the different types of dictatorship, the former being an instance of commissarial while the latter an instance of sovereign dictatorship. Both, however, facilitated the consolidation of Nazi rule, in intricate relation with the notion of the 'people'; the former protecting the 'people', the latter being an expression of the 'people's' constituent power.

Consequently, commissarial dictatorship and sovereign dictatorship show their indissolubility at this point, something evident in Schmitt's famous definition of sovereignty. They are indissoluble because they refer to different processes of legitimating the exercise of public power. Sovereign dictatorship refers primarily to the idea of the people, of a constituent power as the law-positing, establishing power of the legal rule. Commissarial dictatorship refers primarily to the idea of general interest which demands from the dictator to safeguard the security and reproduction of this legal order and 'rule of law'. But both are underlined by a fundamental necessity; that of reproducing the regime of power, property and productive relations of capitalism.

We end up with a *prima facie* paradoxical conclusion that the source of legitimacy of the Nazi State was the law itself, but at the same time the source of the new constitution has to be the 'people'. The validity of the new constitutional order does not derive from the old Weimar Constitution - 'what is alive cannot be legitimated by means of what is dead' -, which is now superseded, but from the constituent power of the German 'people'. This paradox is resolved only if we take into account the common basis of both norm and exception, commissarial and sovereign dictatorship, on the same legitimating mechanism of 'peoplehood'. The conflict between the antithetical conceptualisations of law as a normative and law as a voluntaristic phenomenon was resolved in the actual case of the transition from the Weimar to the Nazi state form by revealing 'law' as being based on both norm and will. It was important for the 'German revolution' to take place through legal means, because this would provide it with the necessary legitimacy<sup>40</sup>. But, it was for the same reasons equally important that the metaphysical concept of 'pouvoir constituant' is there in its absence.

Having looked at the common legitimating basis of the two forms it is now necessary to examine what new the Nazi State form and Nazi legal ideology, as expressed in Schmitt's work, brings. This new distinguishing element is *efficiency* in making the political decision and dealing with the enemy. Based on the above, it is argued that the 'State, Movement, People' is the key to

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<sup>40</sup> The important ideological effect of Hitler being seen as coming to power by the most strictly constitutional means, notwithstanding the coercion against and immediate arrests of members of the Communist Party and trade-Unionists between the Reichstag Fire Decree and the voting of the Enabling Act, is reflected in statements such as the one by Kautsky, that 'the Dictatorship has the mass of the population behind it' (Palme Dutt, 1934, pp. 148-149).

understanding Schmitt's theory of sovereignty and the exception. Until then Schmitt has not named who the enemy is. His theory has already taken sides but the enemy remains unnamed so long as it is only the 'legal state' which is attacked. The Nazi state form is different from the Weimar one in terms of its efficiency in dealing with the 'internal enemy' -i.e. the organised working class movement- and, thus, ensuring the reproduction of the capitalist regime of power, property and productive relations, in the face of rising contradictions which posed a threat to this reproduction.

The bourgeois *Rechtstaat* and the neutral function of law is criticised precisely for not being able to make the political decision. In his 'Legality and Legitimacy', Schmitt argues against the neutral, functionalist nature of the legislative state. In particular he makes the case that the 2/3 majority required for the amendment of the constitution is problematic because it gives equal chance to all parties to ascend to the seat of government and take advantage of the political premium there from. One could thus argue, like Paul Taubes does, that Schmitt's inherent interest was to suppress both forces that threatened the form of the Weimar State: the Nazis and the Communists. However, it is in his 'State, Movement, People' where it becomes obvious that the enemy of the state, the enemy of the 'people', the force that threatens the 'political unity', can be no other than the enemy of the bourgeoisie who has stated goal of overthrowing the capitalist relations of production/exploitation.

One could not wait for the empowerment of a system which by its own weakness and neutrality was in no way capable of recognising even a mortal enemy of the German people, in order to abolish the Communist Party, the enemy of the State and of the people (Schmitt, 2001, p. 3).

In the 'State, Movement, People' it becomes clear that the political premium should not be exploited by the Communists, but it has to be exploited by the Nazi Party in order to safeguard the bourgeois State with the passing of the Enabling Act. This provides us with the substantive content of the -not so formal any more- decisionistic theory of Carl Schmitt. The new form of the Nazi State can make the political decision and crush the enemy who threatens the reproduction of bourgeois rule; and this is what the old form of the *Rechtstaat* could not deal with efficiently.

The 'legal State' with its inherent contradictions and its functionalist neutrality cannot make the political decision and exclude the communists from the equal chance of rising to power. It is only for this reason that the 'legal State' is criticised by Schmitt; because it does not correspond as a form to the needs of the ruling class in a situation of intensification of exploitation and class struggle. On the other hand, the Nazis made use of the two extra-ordinary law-makers -both the

extraordinary law-maker *ratione materiae* (Art. 76 of the Weimar Constitution) and the extraordinary law-maker *ratione necessitatis* (Art. 48), as defined by Schmitt in his ‘Legality and Legitimacy’- so as to change the organisational structure of the bourgeois German State, get rid of its neutral functionalist character, and effectively crush the communist threat after recognising it as the enemy (Schmitt, 2004).

The change in the state form was accompanied by a conceptual shift in the main legitimating mechanism. In the next section the reasons for this shift will be discussed in detail. Suffice to say that besides crushing the ‘enemy’ (which is one of the reasons discussed above), the Nazi State and its corresponding legal ideology serves the equally important function of unifying the ruling class and consolidating the bourgeois rule. Therefore, the notion of political unity, which in Schmitt’s 1928 work ‘Constitutional Theory’ serves as the basis of the constitution-making power of a unified people, gives its place to the principles of leadership and ethnic identity, which can accommodate more efficiently the most aggressive form of reactionary policies of the capitalist state. However, the ideological function served by both notions is the same: the construction of an abstract people, of a unified whole which obscures the fundamental division between exploiting and exploited classes, with the added effect of ameliorating the intra-class contradictions within the exploiting class itself, which was a vital need of mid-war German bourgeoisie.

The Reich Chancellor is the political leader of the German people, *politically united* in the German Reich. The primary importance of the political leadership is a fundamental principle of the present-day public law (Schmitt, 2001, pp. 8-9).

The leadership principle as the cornerstone of political unity of the German people follows upon the plebiscitary legitimacy of the President. Consequently, political unity is identified with ethnic identity and the constitution-making power of the people is identified with the leadership principle (Führerprinzip). This new notion of the people, identified with the Führer, is the new foundational and legitimating principle of the Nazi state. This plebiscitary form corresponds to the new levels of intensification of capitalist contradictions, but serves the same mystifying and legitimating function of the same capitalist relations. It marks the passage from a quantitative total state (a welfare state with a pluralist party system representing different class interests) to a qualitative total state (strong one-party state to represent the interests of the ruling class), to use Schmitt’s definition.

Elections in the former, as was the case under Weimar Constitution, had become an option that split the German people into many incompatible parties. On the contrary, elections in the

qualitative total state, such as the German elections of 12 November 1933, are part of the great plebiscite on which the German people assume a foremost position in the politics of the Reich government by responding to the appeal launched by the political leadership (Schmitt, 2001, pp. 10-11). According to Schmitt, the one-party Nazi state is the form corresponding to the truly unified 'people' now substantively unified on the basis of ethnic identity and the Führerprinzip. And this form corresponds precisely to the ideology of class collaboration which accompanied the new level of intensified exploitation and to the need of consolidation of the bourgeois rule through the amelioration of intra-class conflicts and the elimination of centrifugal tendencies.

## VI. Qualitative and quantitative total state

We saw above that the Nazi state form combined repressive (e.g. ability to identify the 'internal enemy' and to violently suppress the working-class movement) with ideological elements (promoting the principle of class-collaboration through the notion of 'political unity'). These elements were necessary for the reproduction of capitalist relations in need of intensified exploitation. The move from the Weimar to the Nazi state form was necessitated for reasons of efficiency in dealing with socio-economic contradictions. It is crucial here to understand that the concept of 'socio-economic contradictions' is not limited to class struggle between two opposing classes, but extends to intra-class contradictions. These include the intra-class conflicts of the German ruling class that had to be overcome. Therefore, the demand for 'efficiency' can be understood as the need for a strong state to make the political decision to oppose the enemy - i.e. a rising working-class movement-, as well as the need for consolidating the bourgeois rule against centrifugal tendencies.

The intensification of contradictions in the German social formation, following the Great Depression, fostered the need for more 'efficient', authoritarian modes of decision-making. Schmitt's theory of the state, reflecting a specific state form, responds to specific socio-economic conditions (of intensified class and intra-class struggle) which gave rise to the most aggressive form of exercise of State power. This is particularly evident in Schmitt's preferred economic model which empowers capital by freeing it from the regulatory burdens of the democratic welfare state, while his plebiscitarianism drastically curtails genuine popular participation. As William Scheuerman argues, Schmitt provides a political theory of authoritarian capitalism, but one in which authoritarian political institutions are masked by an appearance of popular legitimacy (Scheuerman, 1999, p. 101). In particular, Schmitt's qualitative total state provides for

the 'legal and institutional preconditions for a system in which capitalist proprietors engage in conscious forms of joint supervision of the economy' (Scheuerman, 1999, pp. 103-104).

Where economic decisions are likely to have a 'public' significance, state planners would not dominate the entrepreneur. Instead, entrepreneurs would engage in forms of planning. In Schmitt's own terms, the state planners should not dominate; rather, the (economically) dominant should plan. [...] [The] state must do all it can to encourage private capitalists to engage in relatively far-sighted, sensible forms of economic coordination (Scheuerman, 1999, pp. 103-104).

Schmitt's advocating for a qualitative total state which guarantees authentic state sovereignty while simultaneously managing to provide substantial autonomy to owners of private capital, appears in his 1933 essay 'A Strong State and Sound Economics'<sup>41</sup> and was foreshadowed in a 1930 lecture presented to a prominent organization of German industrialists<sup>42</sup>, the Langnamverein, when he called for a 'rollback of the state [in the economy] to a natural and correct amount' (Scheuerman, 1999). The qualitative total state must replace its quantitative counterpart, a weak, social-democratic inspired interventionist state. The capitalist economy should be 'self-administered', meaning that the 'economic leaders', owners and managers, need to be given substantial autonomy in their industries and factories, and they need to be freed from social-democratic forms of regulation<sup>43</sup>.

Schmitt's argument here is still one of efficiency. Efficiency not only in terms of making the 'political decision' on the friend and enemy, but also with regards to economic planning: for

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<sup>41</sup> According to Franz Neumann, in his 1932 address, Schmitt invented a distinction between two kinds of totality, the Roman and the Germanic'. Roman totality was quantitative; the Germanic, qualitative. The former regimented all spheres of life, interfering with every human activity. In sharp contrast, the Germanic remained content with a strong and powerful state that demanded full political control but left economic activities unrestricted. Schmitt's doctrine is, of course, no more Germanic than its opposite is Roman. In fact, it had been formulated much more clearly and realistically by an Italian, Vilfredo Pareto, who espoused political authoritarianism and economic liberalism simultaneously and who influenced the early economic policies of Mussolini (Neumann, 2009, p. 49). See Schmitt, 'Starker Staat und gesunde Wirtschaft: Ein Vortrag vor Wirtschaftsführern', *Volk und Reich*, no. 2 (1933): 89-90; Schmitt, 'Machtpositionen des modernen Staates' [1933], in Schmitt, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954*, p. 371.

<sup>42</sup> See Schmitt's (untitled) lecture in *Mitteilungen des Vereins zur Wahrung der gemeinsamen wirtschaftlichen Interessen in Rheinland und Westfalen*, ed. Max Schlenker (Düsseldorf: Matthias Strucken, 1930), 458-59. A translation is found in Cristi, *Carl Schmitt and Authoritarian Liberalism*, pp. 212-33.

<sup>43</sup> An example of this self-administration of capital, enabled by the qualitative total state, can be found in an order of the Minister of Economics of November 12, 1936, which transferred a great deal of responsibility for the supervision of the activities of the cartels from governmental authorities to bodies of the economic self-administration. The Minister wrote: 'It is my intention to obtain the co-operation of private economic organisations in the execution of the supervisory activities of the cartels which my ministry has hitherto exercised alone. The administrative bodies of the private economic organisations should be responsible for seeing that the cartels are in harmony with the economic policy of the government in every respect' (Fraenkel, 2010, p. 97)

Schmitt the economically dominant should plan and the state should provide the legal and institutional preconditions, as opposed to the form of the pluralist party and welfare state which reflects the working-class struggle in the form of concessions and freedoms granted to the exploited class in order to avoid a radical overthrow of the property regime. Therefore, the exceptional form safeguards the bourgeois rule not only in eradicating the communist threat but also in promoting and consolidating the interests of monopoly capital.

In both its program and its actual fact, the so-called 'qualitative total state' bases itself on the fundamental condition for the reproduction of capitalist relations, i.e. private property. In his first Reichstag speech on March 25, 1933, Adolf Hitler said: 'The government will on principle safeguard the interests of the German Nation not by roundabout ways of bureaucracy organised by the state but by encouraging private initiative and by recognising private property' (Fraenkel, 2010, p. 60). This function the qualitative total state shares with its predecessor, i.e. the 'quantitative total state', which according to Schmitt was 'a totality of weaknesses'. If the quantitative-Weimar form was vital for reproduction of capitalist relations in face of the 1919 working-class revolt -as was discussed in the previous sections- the qualitative total state was vital for the reproduction of the same in the face of intensified socio-economic contradictions following the Great Depression.

Schmitt's distinction between quantitative (weak) and qualitative (strong) total state may be considered as a manifestation of -or at least as influenced by- the tradition of authoritarian liberalism that emerged towards the end of the Weimar Republic, as a new mode of ordoliberal response to the then crisis of capitalism<sup>44</sup>. In distinction to laissez-faire liberalism, authoritarian liberalism assigned the task of ensuring the constitution of economic freedom to the state and argued that the premise of free economy is the strong state (Bonefeld, 2015, p. 869). The weak state is dismissed by ordoliberalism because it is unable to defend itself against the demands of the popular classes; it does not set limits to contesting social forces and fails to depoliticise the socio-economic relations on the basis of a rule-based system of market interaction. (Bonefeld, 2015, p. 873). Only the strong state can distinguish itself from society and prevent government from becoming the 'prey' of powerful private interests and class-specific demands (Bonefeld, 2015, p. 874).

The question is: What new does the qualitative-Nazi form bring that the quantitative-Weimar lacked? We have already begun answering this question. The focus will now be on the -crucial

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<sup>44</sup> According to William Scheuermann, a noted neoliberal economist, Alexander Rüstow, did not hesitate to confirm the liberal ancestry of Schmitt's conception of the total state (Scheuermann W. , 1999, p. 31). The authoritarian links between Schmitt and ordoliberalism are interesting in their implications for the EU public legal form, explored in the next chapter.



for the function of reproduction- issue of the unification of the ruling class, in spite of intra-class antagonisms and the prevention of 'fratricide' among them. The new form of exercise of public power carried out the function of reproduction in a more efficient manner, in negating the form of the quantitative total state which was unable to make the political decision and could not accommodate the contradictory interests of the ruling class anymore. It has to be noted, however, that the German ruling class of the mid-war period was not a metaphysical subject which decided en bloc and had a single uniform voice. On the contrary, it was replete with conflicting interests which struggled during the period for the best way out of the crisis and for the state form to best accommodate this process. Nevertheless, as Alfred Sohn-Rethel's argues, these conflicting groups were unified in the process of dealing with the common enemy, i.e. the working-class movement, for the purpose of promoting a regime of intensified exploitation, based on the extraction of absolute surplus value. It was for this reason, ultimately, that the dictatorial form of the Nazi State came to being: to consolidate the bourgeois rule and facilitate the intensification of exploitation.

As far as the intra-class conflicts are concerned, it has been argued that during the mid-war period the German businesses were divided into two main groups: those that demanded a policy of free trade, such as the textile and pharmaceutical industries, and those that tended towards protectionism, such as the industries of agriculture, iron and steel (Sohn-Rethel, 1987, p. 16). By the end of the 1920s the leading role had fallen to the former, the so-called new industries, i.e. the large scale finishing ones such as the big chemical firms, the heavy machine manufacturers and the electro-industry, while the iron and steel industries had slipped into subordinate position. This was hardly to the liking of the latter whose aims for realising the full productive potential of their plant could be served only by a determined policy of re-armament (Sohn-Rethel, 1987, p. 46).

The process of concentration of the decisive elements of German monopoly capital in a new grouping of interests is described by Alfred Sohn-Rethel. According to his analysis, on the one hand, the establishment of fascism in Germany in January 1933 was a result of the political victory of the dysfunctional groups of big and small businesses over the financially sound parts of the German economy, since, by the end of 1932 the near entirety of German finance capital had coalesced on a policy bent on violent expansion and war (Sohn-Rethel, 1987, p. 89). Germany's production capacities were far too large for its own narrow market. Hence the need for a larger internal market arose. This was expressed in the Nazi theory of the 'Living Space', but also in the expansion of the armament policies.

On the other hand, the victory of one group of businesses over the other, as expressed in the decision of the German investment industries to expand their monopoly market by means of their

Central European Policy, was underlined by and corresponded closely with the *common interest* in suppressing wages and increasing the number of working hours.

If wages were not curtailed as soon as possible, capital would be; for the crisis had seen a large section of industry caught between the variable costs of wages and the fixed ones of capital; if losses were not compensated by wage cuts, many businesses would be pushed over the brink. Even such financial giants as I.G. Farben began to get nervous (Sohn-Rethel, 1987, p. 55).

A reversion of the capitalist mode of production *from the relative to the absolute surplus value extraction* (i.e. intensification of exploitation by increase in the number of working hours and drop in real wages) was necessitated for the German capital not to spiral downwards into inescapable crisis. Of course, the attack on the workers' rights and the welfare state and the pursuing of policies directed at the lowering of labour costs did not begin with Hitler's rise to power. Ever since September 1926, the German industrialists had showed that they could no longer afford the gains won by the working-class between 1918 and 1923, by issuing a statement attacking 'too generous distribution of social benefits' and calling for a 'reduction of the burden of taxation' in order to 'restore the profitability of the economy' (Sohn-Rethel, 1987, p. 8). Just weeks after the Wall Street crash, the League of German Industry called for the welfare state to be 'adapted to the limits of economic sustainability' decrying 'unjustified and immoral abuse' of social security benefits because in their eyes the economic crisis had been caused by a bloated welfare state, high wages, and short working hours (Bois, 2015).

This shows that the Weimar-welfare form could not accommodate the new conditions of intensified exploitation. The state had to shed its skin and assume a different form. What German finance capital needed above all was *to break out of the falling rate of profit by the only means in existence that depended neither on other capitalist powers nor on the world market, i.e. a forced raising of the rate of surplus value by the slashing of the workers' wages* (Sohn-Rethel, 1987, p. 89). This was the economic need that was met by Hitler's policies which consisted of a systematic lowering of wages. The millions of unemployed were gradually re-employed at rates of pay no higher, or hardly so, than their unemployment benefit. 'Work for all, not wealth for all' as the Nazis expressed it after they had smashed the trades unions. The great mass of financially weak firms welcomed Hitler's economic 'revival' methods because through them they could escape the more or less acute danger of bankruptcy (Sohn-Rethel, 1987, p. 39).

But the aggressive policies necessary to achieve this systematic lowering of wages involved a sustained attack on workers' rights which were safeguarded in the Weimar Constitution. The

leaders of German industries were well aware that the policy they were compelled to pursue in the economic crisis, with the attacks on all sections of the workers, including those who had gained by the previous social legislation, inevitably meant the weakening of the basis of Social Democracy. These policies *could not be realised* in conditions of intensified class struggle and growing militancy of the workers, *unless* the bourgeois elite was able to smash not only the proletarian political organisations but also the mass basis appropriate to the previous system of control through relative surplus value production, namely the trade-unions and social democracy. The best analysis of the reasons that necessitated the change from the Weimar to the Nazi form was made before the Reichstag on May 21, 1935 by Adolf Hitler himself:

In order to assure the functioning of the national economy it became *necessary to arrest the movement of wages and prices*. It was also *necessary to stop all interferences which are not in accord with the higher interests of our national economy*, i.e. it was *imperative to eliminate all class organisations which pursued their own policies with regard to wages and prices*. The destruction of the class-struggle organisations of employers as well as of employees required the analogous *elimination of those political parties* which were financed and supporter by those interest groups. This process, in its turn, caused the introduction of a new constructive and effective ‘living constitution’ and the refoundation of Reich and State (as quoted in (Fraenkel, 2010, p. 187)).

As former Nazi official Albert Krebs described in his memoirs: ‘Not all capitalists were particularly enthusiastic about the Nazis, but their scepticism was relative and ended as soon as it became clear that Hitler was the only person capable of destroying the labour movement’ (Krebs, 1976). The Nazi state form and the Nazi economic model formed a unified yet contradictory whole, which is reflected in the concept of ‘qualitative total state’ in Schmitt’s theoretical framework. These new economic and political forms corresponded to the intensification of capitalist contradictions after the capitalist crisis and to the objective need to restore the profitability of German enterprises and to advance to a new political system, which was to build upon a new system of mass organisation which would defeat and disrupt the working class movement.

The objective function of reproduction of the capitalist relations, in the context of socio-economic and political crisis, was accompanied by the subjective element of the specific interests promoted by the Nazi form. Of course, the promotion of specific interests and the enhancement of specific fractions of capital does not mean that a price was not paid. At best, the capitalist elite had to share power with the elite of the party and with the bureaucracy of the state and party (Fraenkel, 2010, p. 183). The industrialists in the west and the landlords in the east, who supported Hitler in

the hope that they would be able to remain masters, by using him for their purposes, received special favours from the government, and, thanks to the policy of the government, they were enabled to reap considerable profits and gains in capital values and to strengthen their position in the leading concerns (Fraenkel, 2010, p. 183).

## VII.     Reproduction and public legal form

The Nazi state form reproduced the foundational condition of the capitalist relations (i.e. private property) in the face of rising class and intra-class contradictions. In order to achieve this goal it functioned so as to unify the competing ruling-class fractions, containing any centrifugal tendencies; simultaneously, and equally significant, was its function of enabling the conditions of intensified exploitation by violently suppressing the labour movement and eliminating any resistance to aggressive capitalist policies. It can safely be argued that throughout its existence the Nazi form was vital for maintaining the legal foundations of the capitalistic economic order (Fraenkel, 2010, p. 72). In order to do so, the Nazi form, apart from introducing a variety of authoritarian elements, had to preserve and reproduce structures that ensured the calculability necessary for the functioning of a capitalist economy.

Ernst Fraenkel's analysis of the Nazi state form as a 'dual state' is illuminating of this point. Fraenkel described the Nazi state as being a dual state in that it combined elements of a 'prerogative state' and a 'normative state'. The prerogative state was the authoritarian element and the site for discretion and arbitrariness. On the contrary, the normative state, described by Fraenkel as a 'qualified Rule of law' in which traditional legal mechanisms still operate, regulates many economic transactions within Nazi Germany (Scheuerman W. E., 2000, p. 90). The existence of a normative state is essential, because it protects the institutions of private property, contract, and private enterprise, which are not only essential but still the basis of German social formation (Fraenkel, 2010, p. 186).

Fraenkel's analysis comes to supplement and enhance Franz Neumann's analysis of the Nazi state form. In his 'Behemoth', Neumann argues that the emergence of monopoly capitalism necessarily entails arbitrary power that directly serves the large-scale capitalist firm<sup>45</sup> (Scheuerman W. E., 2000, p. 90). Even if it is accepted that monopoly capitalism is often more discretionary than its

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<sup>45</sup> 'Legal standards of conduct (blanket clauses) serve the monopolist. [...] Not only is rational law unnecessary for him, it is often a fetter upon the full development of his productive force, or more frequently, upon the limitations that he may desire; rational law, after all serves also to protect the weak' (Neumann, 2009, p. 447).

competitive capitalist predecessor, and that the intensified contradictions that accommodate this highest stage of capitalism necessitate a move towards more authoritarian forms of exercise of public power, this arbitrariness remains compatible with the preservation of some minimal measure of legal calculability, for both these elements in the last instance serve the reproduction of the capitalist relations of production.

Fraenkel would disagree that National Socialism completely destroyed the ‘generality of the law’, because he is unwilling to accept that capitalism, even in its monopoly or organised stage, can do without some measure of traditional legal calculability altogether. His interpretation shows, perhaps with more accuracy, why the Nazi state is primarily a capitalist state, combining necessary elements for the reproduction of capitalist relations of production through both legal security and arbitrariness. From this standpoint, Fraenkel’s dual state seems perfectly compatible with Schmitt’s qualitative total state. For both authors, the Nazi state form assumes authoritarian characteristics, which are necessary for the reproduction of the capitalist regime in the face of intensified contradictions, but the sphere of activity of capital and private business is left untouched by these authoritarian policies, left to the self-administration of capital and protected by the ‘normative state’.

The ‘prerogative state’, the main site for Nazi legal arbitrariness, is functioning alongside the normative state; it not only conflicts with the normative state, but it intervenes in the latter whenever its representatives consider it appropriate; it is legally unlimited vis-a-vis the normative state: when politically desirable, court decisions are simply discarded or revised (Scheuerman W. E., 2000, p. 91). But, in Fraenkel’s interpretation a significant number of more or less traditional legal proceedings are left seemingly untouched by National Socialism<sup>46</sup>. To the extent that the Nazi state form reproduces the main conditions of capitalism (private property, contract, private enterprise) the scope of the Prerogative State is limited. The reproduction of capitalist relations of production is the content, purpose and absolute limit of Nazi state form.

Furthermore, a related point can be raised with regards to the Nazi state’s policies of privatisation -a point which resonates with the current economic crisis and the policies of neo-liberalism. Contrary to popular belief, the Nazi state did not promote the growth of the nationalised sector. Nationalisation was particularly important in the early 1930s in Germany, before the Nazi party came to power. The state took over a large industrial concern, large commercial banks, and other

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<sup>46</sup> An example of this is provided by the estates system of the Nazi regime: ‘The most important attempt of private business to free itself from the intervention of the police authorities is to be found in the estate system. [...] The symbol ‘estates’ merely serves as a protective ideological colouring adopted by business-men to protect themselves from the interference of the Prerogative State. Their protection is simply this -that matters within the jurisdiction of the estates are de facto outside the police power’ (Fraenkel, 2010, p. 97).

minor firms, in order to minimise the effects of the economic collapse ensuing the Great Depression. However, by the mid-1930s, the Nazi regime transferred public ownership to the private sector (Bel, 2010, p. 34). The Nazi economic system did not show an increase of state-ownership in banks and industrial enterprises, but surrendered on large scale public holdings which had accumulated in the crisis years preceding 1933 in different sectors<sup>47</sup>: railways, steel and mining, banking, ship building and shipping lines (Bel, 2010, p. 38), (Sweezy, 1941). In fact, it is interesting to note that in 1936 the German term '*reprivatisierung*', and the associated concept, were brought into English in the term 'reprivatisation', and soon the term 'privatization' began to be used in the literature (Bel, 2010, p. 35).

Even in cases of joint control of public and private managers, the power of private capital was certainly not threatened or broken by public control -on the contrary, in the control of public corporations, private capital played a decisive part (Neumann, 2009, p. 298). In fact, C. W. Guillebaud felt that National Socialism was opposed to state management, and saw it as a 'cardinal tenet of the Party that the economic order should be based on private initiative and enterprise (in the sense of private ownership of the means of production and the individual assumption of risks) though subject to guidance and control by state' (Bel, 2010, p. 44), (Guillebaud, 1939).

To the question of whether the Nazi economic model was capitalist or state controlled, a theoretical analysis gives the answer that the two are not incompatible. In fact, Franz Neumann's comprehensive analysis of the Nazi structure reveals the German economy as based on two broad and striking characteristics. It is a monopolistic economy and a command economy. It is a private capitalistic economy, regimented by the totalitarian state (Neumann, 2009, p. 261). The private capitalists had extreme powers<sup>48</sup> and control of the economy remained overwhelmingly in their

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<sup>47</sup> The case of Vereinigte Stahlwerke (AG) -or United Steelworks- is indicative. United Steelworks was an industrial conglomerate that produced coal, steel, and iron from the mid-1920s until the end of the Second World War. This conglomerate included several companies, with dominant among them Thyssen AG. Fritz Thyssen, who held the leading position in United Steelworks, had been one of only two leading industrialists to give support to the Nazi Party before it achieved political dominance. In 1932, the state took over the shares at 364 percent of their market value in an attempt to mitigate the devastating effects of the crisis of 1929. Soon after the Nazi Party took power, however, and after the reassuring of its return to profitability with the policies of rearmament, United Steelworks was reorganized so that the government majority stake of 52 per cent was converted into a stake of less than 25 per cent, no longer sufficient in German law to give the government any privileges in company control (Bel, 2010, p. 39).

<sup>48</sup> Evidence of the extreme powers of monopoly capitalist formations can be found in the cartel decree of 15 July 1933. This statute allowed cartels to destroy unreliable competitors by means of boycotts or similar measures. It aimed at the exclusion of all unreliable businessmen from the economic system, and it found unreliability wherever a competitor sold below justified prices, even if he was not bound by any price agreement. The price-cutter could be exterminated by private power with the sanction of the state. However, the extermination of the price-cutter was not provided for in a planned or direct manner. In a manner which conformed with the principles of the 'qualitative total state' it was not the state that purified the economic system. The death sentence was pronounced by a private organization, although the president of the cartel tribunal had to give his

hands. The continued existence of an influential group of private capitalists does not conflict with the trend toward bureaucratisation of the economy. Not only are private capitalism and bureaucratization of the economy not incompatible, they actually complement each other at a certain stage in the development of monopoly capitalism (Neumann, 2009, p. 385).

The essence of National Socialist social policy consisted in the reproduction of the class character of the German social formation, in the attempted consolidation of its ruling class, in the atomization of the subordinate strata through the destruction of every autonomous group mediating between them and the state, and in the creation of a system of autocratic bureaucracies interfering in all human relations (Neumann, 2009, p. 365). The maintenance of capitalist ownership, 'private enterprise', and the recovery of 'profits' and 'profitability', accompanied with moderate state intervention in a regulatory role were characteristics of the mid-war corporatist state, and were reflected in Schmitt's economic model of the 'qualitative total state'.

Consequently, the Nazi state form was necessitated by the intensification of class and intra-class conflicts. The Nazi state reproduced the fundamental conditions of capitalism in the face of intensified contradictions and in the need of intensified exploitation. The deadlock in economy and the contradictions between protectionism and inflation were a manifestation of the capitalist contradictions in intra-class conflicts. But the capitalists were unified against the main opponent, namely the working-class organised in workers' unions and workers' party. The measures against the workers had to be passed and for this the communist threat had to be extinguished. This urgency for action on the part of the industrial capitalists was reflected in the use of the extraordinary law-making provisions, of Article 48, in the Reichstag Fire Decree, and of Article 76 in the passing of the Enabling Act which consolidated the Nazi rule.

Having looked at the main factors which necessitated the change in the form of exercise of public power, it is time to reflect upon the public form of plebiscitary legitimacy, as concretised in the principles of 'leadership' and 'political unity'. What different does this form bring? How does the main legitimating mechanism, based on the concept of the 'people', adapt to the new socio-economic configuration? To begin answering this question it is important to go back to Schmitt's 'quantitative-qualitative' total state distinction and revisit his idea of the 'political'. As mentioned above, the legal *Rechtsstaat* was considered inefficient and was criticised by Schmitt precisely because it failed to make the ultimate political decision, i.e. it failed to decide between 'friend and enemy'.

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consent. This purification was directed exclusively against the small retailer, wholesaler, and handicraftsman (Neumann, 2009, p. 264).

This legal *Rechtsstaat* was also a 'quantitative total state' in the sense of providing the chance to many parties or interest groups 'to make their political decision' and decide on their 'friends and enemies'. Against this total state, against the neutralized liberal democratic state, Schmitt advocates the total de-politicisation of civil society and the total concentration of political power in an authoritarian state. To repeat a point raised earlier, the 'political' decision (as well as the use of the political premium to enact this decision) is not for everyone. It appears then that Schmitt is fundamentally against 'the political'. Social groups, trade unions, must have no political voice of their own. They must not be allowed to express their own economic and political interests. A qualitative total state rises above the conflicts within society, and ensures its reproduction, while suppressing these contradictions. The question 'in whose interests' has already been answered above.

This deep de-politicisation of society had to take place in the form of its opposite, i.e. 'extreme politicisation' in the form of the plebiscite and the identification of rulers and ruled. In his early analysis of the Weimar form, even before the Nazi form, the election of the Reichspräsident was interpreted by Schmitt as something different from a democratic election; it was seen as a plebiscitarian acclamation. It is no wonder then that in the Nazi form of the plebiscite, popular sovereignty reaches an extreme point of 'hollowness'. Only a decisionist President, a leader (Führer) could escape civil society's centrifugal pluralism, 'unify the people' by holding its trust. It could thus provide the perfect legitimating mechanism for a class-collaborative form of state to reproduce the conditions of intensified exploitation necessary for the recovery and expansion of German capital.

The plebiscite, this new form of legitimation, was united in its difference with the form of parliamentary elections which it superseded. They both share an abstract and class-less conception of the 'people'. The people appear on stage when they are asked to vote, and then recede in the background once they have 'blessed' and legitimised a new round of policies, which they have supposedly chosen in an expression of the 'general will'. But, whereas in liberal democracy, an election provides an opportunity for freewheeling debate about candidates and political parties, and the election is seen as culminating in some 'normativisation' (i.e. a piece of general law deriving its legitimacy from rational debate), the Schmittian plebiscite is simply a 'decision giving expression to an act of will', a means by which the popular masses can hope to approximate 'a pure decision not based on reason and discussion and not justifying itself' (Scheuerman, 1999, p. 102). The plebiscite as a distinctive form has the advantage for the ruling class to present the voters with only an extremely limited choice, a polarising and reductivist distortion of the many-sided reality. Moreover, it deals in binaries and has the added advantage of



the voters' utter dependence on the way the question is formulated (as Schmitt himself point out in his 'Legality and Legitimacy').

Therefore, plebiscitary legitimacy and the leadership principle served a double purpose: on the one hand they acted as a unifying force against centrifugal tendencies, a form accommodating the reconsolidation of German capital; on the other, they provided the legitimating mechanism necessary for the conditions of intensified exploitation. For this reason, the effect of the leadership principle was not confined to constitutional law, but it is encountered in Nazi Germany's labour law too. The Nazi state was a 'qualitative total state' indeed, as it set up the German Labour Front comprising of both employers and employees, no longer called by the old names but now termed 'leaders' and 'followers'. The 'Law for the Organization of National Labour' was issued on January 20, 1934 and under it the German Labour Front was the inclusive organization of German brain and hand workers (Thomas, 1936).

It is pertinent here to raise a comparative point on the relation of the German Labour Front to the Weimar system of labour law, which was examined in the previous sections. First, with regards to Weimar, paragraph 1 of the Works-Council Law of 4 February 1920 states as one of the two basic objectives of the Works-Councils: 'to support the entrepreneur in fulfilling the works-objectives'. Similarly, paragraph 1 of the 1934 Law for the Ordering of National Work provides: 'The entrepreneur, as leader of the works, and the employees and workers, as his following, work together in the works for the advancement of the works-objectives and for the common service of people and state' (Kettler, 1984, p. 296). It is evident that both provisions share the notion of works-objectives, which obfuscates the contradictory interests of capital and labour in the production process. Moreover, the provisions share a depiction of the employer as the leader of this works-community, even though the leadership principle is much more obvious in the Nazi legislation.

However, the influence of the constitutive fiction of 'community' is evident in both provisions. The ideology of *Gemeinschaft* ('community') is necessary as the mask hiding the still existing capitalistic structure of society (Fraenkel, 2010, p. 154). It is obvious that the ideological effect of this fiction is necessary even in the context of heightened repression. As Neumann pointed out, this conception 'ignores the fundamental social divisions between labour and capital and provides a central ideological theme for the National Socialist legislation on the organisation of national work, establishing the 'Fuehrer'-principle in all enterprises and reducing workers to the status of dutiful vassals' (Kettler, 1984, p. 279).

The German Labour Front was a crucial element of the qualitative total state, as it was the main mechanism of class collaboration. The interests of workers, i.e. the ‘followers’, were identified with the interests of capitalists, i.e. the ‘leaders’. We find here the leadership principle at work in labour law. The ‘leader’ makes the real decisions and this fact became undeniable in 1935, when the Reich Chamber of Economics (a bureaucratic organization, containing all the employers in Germany, controlled by the Ministry of Economics) joined the Labour Front (Thomas, 1936). The German Labour Front employed the ‘Führerprinzip’ in the economy and as the main form of class-collaboration provided the Nazi regime with the social power base necessary for its reproduction. Fascism as reconsolidation of the bourgeois regime would be unsuccessful unless it managed to bind to itself strata which socially do not form part of it but which would afford it the inestimable service of anchoring its rule in the people (Scheuerman, 1999, p. 122). If the Labour Front was the mechanism used to effectuate this in the economy, plebiscitary legitimacy and the leadership principle were the main legitimating forms to achieve this in the sphere of constitutional law and ideological legitimization of power.

It follows from the above that changes in German constitutional law and changes in German labour law were intertwined during the mid-war period. The reason for this was shown to have been the intensification of social and economic contradictions. Abolishing the rights to strike and collective bargaining and crushing the working-class movement while creating a new social basis based on the principle of class-collaboration could not have been achieved unless the form of exercise of public power had changed. The mid-war model of the corporate state<sup>49</sup> was based on the one hand on the principles of ‘national sovereignty’ and ‘national unity’, and on the other on a concept implicit in the State system which Fascism desires to build up, namely, the economic collaboration of the various categories engaged in production (Pitigliani, 1933). Schmitt’s theoretical framework accommodates both these principles, as is evident in the above analysis.

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<sup>49</sup> Franz Neumann held that the Nazi state form was incompatible with the model of the corporate state, because for National Socialism the primacy of politics is decisive. The reason he gives for this is that the Nazi Party never allowed itself to put the economic questions into the foreground and to announce comprehensive economic official party programs; it has always insisted on the primacy of politics over economics and has therefore consciously remained a political party without any basic economic orientation (Neumann, 2009, p. 232). However, the structural role of a political party in a social formation is hardly restricted to its political intentions and announcements through party programmes. It is, on the contrary, assessed by the objective effect its policies have in the social formation. Neumann himself acknowledges that the role played by German Labour Front was one of promoting ideas and practices of class collaboration, under the influence of corporative ideas (Neumann, 2009, p. 414). In this respect the Front served five crucial functions: the indoctrination of labour with the National Socialist ideology; the taxation of the German working class; the securing of positions for reliable party members; the atomization of the German working classes; and the exercise of certain inner trade-union functions (Neumann, 2009, p. 417)

We conclude that the normal and the exceptional forms of exercise of public power are different but not separated. They are rather united in their difference. A fundamental necessity underlies both norm and exception: the necessity of a regime of power, property and productive relations. The ordinary function of the rule of law, which safeguards this regime, is conditional upon the non-occurrence of the always existent and imminent danger, which Schmitt terms as the 'ever-present possibility of conflict'. It has been argued that this 'ever-present possibility of conflict' stands for the intensification of social antagonisms. This concept includes a multiplicity of factors (intra-class conflicts and class struggle) which might necessitate a change in the form of exercise of public power.

Having looked at the transition from the Weimar state form (quantitative total state) to the Nazi state form (qualitative total state) the main factors which necessitated the change in the form of exercise of public power have been identified as falling within the concepts of class and intra-class conflicts. In particular, Schmitt's argument on the efficiency of the Nazi state form in dealing with the internal enemy, so as to crush the resistance of the working-class movement and facilitate the intensified exploitation of the working-class and the poor social strata has been assessed in the context of the mid-war crisis-ridden Germany. In this context, this factor is interconnected with the reconsolidation of the German bourgeois rule which had to follow the new configuration of power between different interest groups of German capital. Finally, we saw the effect that the new forms of legitimacy, based on an extension and further 'hollowing' of the concept of peoplehood, had on the new socio-economic relations. It can, therefore, be concluded that rather than 'being taken outside', the exception emerges from within the law, it is bound within law because it corresponds to a foundational need.

We argued that one form gives its place to the next in order to accommodate new forms of intensified exploitation. In this context we examined the change from the Weimar form -which promoted class collaboration predominantly through ideological means, so as to reproduce capitalist conditions of extraction of relative surplus value- to the Nazi form -which violently imposed policies of class collaboration by suppressing the labour movement, in order to reproduce conditions of extraction of absolute surplus value. We saw that the Weimar form contributed to the reproduction of the capitalist relations, by fulfilling the function of containment of class struggle, and by promoting the principle of class-collaboration.

But the reproduction of the fundamental condition of capitalism eventually led to its demise, as soon as it could not contain class struggle in conditions of intensified contradictions. The need for extraction of absolute surplus value through intensified exploitation meant that the rights and concessions to the labouring classes had to be done away with. The state had to shed its skin and

assume a new form. It had to get rid of its welfare form, as well as of several aspects of its normal/liberal form (others were preserved as the notion of ‘normative state’ explains). This precariousness of the welfare form is one of the themes to be examined in the next chapter on the form and content of the Greek crisis legislation.

## **Chapter Five: The form of the Greek crisis legislation**

Is a Damoclean sword hung over Greece and other EU countries? This metaphorical question could be answered in the affirmative, on the assumption that this sword takes the form of Memorandum of Understanding. Perhaps more accurately, one could argue that this sword takes the form of an EU-wide supervisory mechanism the framework for which has been set by the Fiscal Compact of 2012. Karl Marx uses the same metaphor to describe the change in the form of exercise of bourgeois political power during Luis Napoleon's reign (Marx, 2009). This change involved the prioritisation of executive procedures at the expense of parliamentary discussions. The bourgeoisie that had previously extolled the liberal freedoms of parliamentarism now promoted the strengthening of executive powers and the removal of decision-making from popular strata; a tactic that was enabled by the fundamental aspect of the modern political and legal apparatus, described as *raison d'état*, and has to do with the vital need of the state to perpetuate itself as an entity.

In analysing this fundamental element of modern constitutional and political structures, Marx discerned the social content behind the political form. He identified the intensification of social and economic contradictions as the motor behind this change in the form of exercise of public power. The importance of this theoretical point was shown above in the analysis of the change from the Weimar Republic to the Nazi state form. This change and its reflection in the shifts and continuity in Carl Schmitt's theoretical framework cannot be understood unless seen in their unity with these intensified contradictions. The application of this Marxist analysis will continue in this section with the examination of the form of the Greek crisis legislation.

Of course there are major differences between the change in the form of the Greek crisis legislation and the transition in mid-war Germany. In fact, there is no absolute change in the form of exercise of public power in the context of the Greek crisis. There is no fascist party having assumed political power -at least not yet. There has been no major constitutional change -with emphasis put on the word 'major', as there have been various new constitutional practices, such as a tendency of introducing policies en bloc overnight. Additionally, the economic and demographic sizes are different. We are not living in a mid-war period. The crisis of '08 did not follow a World War as did the crisis of 1929 -even though one could argue that the effects of the post-War (class and international) settlement are challenged now in Greece and worldwide. One is of course not certain whether the currently developing contradictions would resolve in a new world war. Perhaps, more importantly for the argument developed here, there is no working-class revolution or a strong working-class movement to which the change in the state form responds to.

Nevertheless, class struggle plays the central role in this process of change in the form of exercise of public power in contemporary Greece, as much as it did in mid-war Germany. If there is one thing that both crises and their effects on legal rights and provisions reveal is the precariousness of concessions in capitalism. The welfare state and social rights are revealed as contingent upon the eruption of a new crisis, i.e. -to put it in the terms used so far- upon the intensification of contradictions. The reproduction of conditions for the extraction of absolute surplus value -i.e. the reproduction of conditions of intensified exploitation- necessitates the elimination of the hard-won concessions and rights of the labouring classes. Additionally, this elimination and reproduction is best achieved by more authoritarian forms of decision-making, distantiated from the popular strata.

We saw above that the response of the League of German Industry to the Great Depression was a call for the welfare state to be ‘adapted to the limits of economic sustainability’ because in their eyes the economic crisis had been caused by a bloated welfare state, high wages, and short working hours (Bois, 2015). These demands, which were met by the Nazi regime, reflected needs expressed even before the crisis, ever since September 1926, when the German industrialists had showed that they could no longer afford the gains won by the working-class between 1918 and 1923 (Sohn-Rethel, 1987, p. 8). In the same manner, in the Greek context, the Hellenic Federation of Enterprises called for a better alignment with reality of the Greek legislation on collective bargaining, reiterating a long-standing demand of the Greek capitalists, as well as a long-standing policy of the European Union (Koukiadaki & Kretsos, 2012, p. 276).

Therefore, the main point developed in this section is that the form of the Greek crisis legislation can only be explained if it is assessed in its unity with the socio-economic content. Legislative form and content are to be seen in their dynamic unity, reflecting the level of intensification of social antagonisms. The public legal form necessarily changes so as to accommodate conditions of intensified exploitation, on the basis of rising capitalist antagonisms. This is what this chapter explores. The ‘Greek crisis legislation’ includes the three Memoranda of Understanding, the corresponding primary and secondary legislation implementing them within the Greek legal order, and their basis on EU law. All three Memoranda of Understanding (‘Memoranda’) were agreed upon by the Greek government and the troika -International Monetary Fund (‘IMF’), European Central Bank (‘ECB’), European Union Commission (‘Commission’)- and accompanied the Greek bail-out. In fact the bail-out is conditional upon the implementation of these measures, according to the principle of conditionality, which accompany all similar programmes drafted by the IMF.

The Greek crisis legislation will be submitted to a dialectical analysis, in the sense that the measures included therein will be examined as a unity of form and content. The Memoranda, as form of implementation of these measures, invoke the 'exceptional circumstance' of the 'unprecedented' Greek crisis in order to 'exceptionally' justify the implementation of these measures. However, the simple condemnation of the exceptional form in favour of a normal procedure, or in favour of the 'true essence' of the constitution, is not enough. The Greek Council of State (CoS) has accepted the constitutionality of these measures based on the justification that they are 'necessary'.

On the basis of this 'necessity', the Memoranda are analysed as the form of implementation of measures that were seen as necessary to restore the profitability of capital, even before the crisis. The fact that they were 'necessary' does not mean, of course, that the content of these measures was 'fixed'. It is important then to ask ourselves why these specific measures were introduced and look for the answer in the dynamic concept of class struggle, in the sense of the intensification of social and economic antagonisms. If there has been a change in form (in fact a proliferation of the form of the Memoranda in Europe as well as a more general tendency of 'necessary' legislation passed in the 'general interest') we need to ask ourselves what is the content of this form. *What* is 'necessary' about these measures? Why and for whom are they 'necessary'?

The analysis begins with a discussion of the 'exceptional' form of the Memorandum of Understanding. It is followed by a discussion of the decisions of the Greek Council of State on the constitutionality of the Memoranda and their integration in the Greek legal order as 'necessary'. The implications of this 'necessity' and its content are discussed thereafter. To understand the necessity of the form of the Memorandum one has to understand the necessity of the measures introduced with the form of the Memorandum. This endeavour includes two parts. On the one hand, the content of 'necessity' is sought in EU legislation. EU law is analysed as a totality of rules and principles which relate to each other and are informed by a particular political conception of how social and economic relations should develop and be regulated. The Memorandum is seen as a form of implementation of policies and principles found in EU legal and political documents.

On the other hand, the 'necessity' of the measures implemented through the form of the Memorandum is sought in the socio-economic contradictions and their intensification due to the uneven development in capitalism. The third Greek Memorandum seeks the implementation of measures which are implemented across the EU according to 'best practice'. The concept of 'best practice' stands for a practice which is 'necessary' and which is implemented with or without the

Memorandum form. This necessitates a comparative analysis of labour law reforms implemented even in countries without memoranda, such as France and Italy, in order to identify what is considered ‘necessary’ in these ‘best practices’.

It is argued that the EU state project has, since its inception, been embedded in a capitalist system of uneven relations and development, which can account for the post-crisis development of policies and legal changes. The need to facilitate conditions of intensified exploitation has led to the labour legal form of flexibility and the introduction of labour reforms throughout the EU. These measures -‘necessary’ to restore the competitiveness of each Member State and the EU as a whole- are due to the intensification of intra-class antagonisms which leads to intensification of class struggle. On the basis of capitalist uneven development, capitalist countries need to lower wages and increase exploitation in order to compete amongst themselves and with other antagonists. Moreover, these socio-economic contradictions necessitate changes in the public legal form, not only at the national but at the supra-national level, too.

Therefore, the concept of class struggle -in the sense of a dynamic process of intensification of social (class and intra-class contradictions) contradictions which necessitates changes in the form of exercise of public power whenever there is a ‘need’- is crucial for the analysis. The Greek crisis legislation is to be assessed in the context of a capitalist crisis, necessitated by the contradictions (overproduction, over-accumulation and uneven development) of capitalism; a global crisis affecting all monopoly groups and transnational companies (magnifying the interdependency of globalised capitalism); but more importantly affecting the workers and popular strata throughout the world, whose exploitation must be intensified so that capital might hope for a way out of the crisis. This intensification of social contradictions necessitates the Memorandum as a change in the form of legal implementation of the ‘necessary’ measures.

## I. The necessary form of the Memorandum

Let us begin the examination of the Greek crisis legislation as a unity of form and content with the first of the constituent parts of this relation, i.e. the form -and more specifically the form of the Memorandum. Why the Memorandum and why in Greece? The goal is to see why the Memorandum was considered as the appropriate form of the Greek crisis legislation, as well as to identify the relation between the form of the Memorandum and the language of necessity used by the Greek courts to justify its implementation in the Greek legal order. As mentioned above, Memoranda of Understanding were an integral part of the International Monetary Fund’s



structural adjustment programmes which introduced aggressive capitalist policies in South American economies. In the last decade, Memoranda have been essential parts of the agreements between several EU Member States (Greece, Ireland, Portugal) and the IMF and EU institutions for the bail-out of these Member States' economies.

Crucial for the development of these policies and the adoption of this form of implementation has been the construction of the capitalist crisis as a 'sovereign debt crisis'. The dominant interpretation of the economic crisis, as it developed in the Eurozone countries, attributed the crisis to weaknesses of governance of these specific countries, as well as the 'euro area' in general<sup>50</sup>. In this context the focus was on reasons endogenous to these specific Member States: administrative reasons (systems which foster political clientelism, weak control of public expenditure); and economic reasons (low competitiveness, trade and investment imbalances, and fiscal mismanagement). According to this narrative, Member States which had failed to implement measures to enhance their competitiveness could not keep up with strong and growing economies and resorted to heavy borrowing, therefore increasing their sovereign debt.

Consequently, the Memorandum of Understanding aims to serve a double purpose of dealing with the sovereign debt through the provision of bilateral loans, while introducing in the legal systems of these Member States the necessary remedies for their respective economies. The Memorandum as form of implementation achieves the following: on the one hand, it is considered necessary in order to meet the exigencies of the crisis; on the other hand, it is considered binding because it is part of an international agreement and failure to meet the objectives set therein will automatically result in the default of the Greek economy, which, according to the narrative which has shaped Greek politics for the last years, will bring economic disaster, chaos, and poverty.

Crucially, the ratification of all three Memoranda (documents of at least 600 pages each, containing a detailed list of measures aiming at the radical reorientation of the Greek economy and encompassing the whole spectrum of public policy-making -fiscal policy, fiscal institutional reforms, financial sector regulation and supervision, privatizations, and 'growth-enhancing structural reforms', i.e. labour market reforms, enhancement of competition in open markets, reformation of the educational and judicial systems) by the Hellenic Parliament took place with the use of the emergency parliamentary procedure<sup>51</sup>. As a result of the use of this exceptional

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<sup>50</sup> Indicatively, see (Featherstone, 2011), (Kouretas & Vlamis, 2010), (Zahariadis, 2010).

<sup>51</sup> Article 109 of the Standing Orders of the Greek Parliament provides that 'if a bill is characterised as urgent, it is processed and examined in one sitting', while 'the debate and passage of the urgent bill is concluded in one meeting which cannot last more than ten hours'. Furthermore, the process of ratification of an Act by the Parliament is characterized as *interna corporis*, and as a result is not subject to judicial review.

procedure, there was no substantive public consultation over the reforms. This was justified on the basis that ‘it was not possible to accommodate participatory methods when Greece was about to default on its loans’ (Koukiadaki & Kretsos, 2012).

The form of the Memorandum can, thus, be explained by reference to its efficiency. However, this efficiency could be undermined. For a dualist legal system, like Greece, implementation the Memorandum can only be incorporated in the Greek legal order through an Act of Parliament. Furthermore, in Greece judicial review involves the courts checking the constitutionality of statutes. In addition to this, the legislation included in Memoranda arguably contradicts certain rights safeguarded in the Greek Constitution (such as Articles 22 and 23, i.e. the right to work and the freedom to unionise respectively)<sup>52</sup>. So, the form of the Memorandum could be rendered ineffective if Acts of Parliament were found unconstitutional by the Greek Council of State.

We come to the conclusion that the form of the Memorandum would not be so efficient had it not been accompanied by another closely associated form of exercise of public power, i.e. the phenomenon of judicial deference, which involves the alignment of the will of the judiciary to the will of the executive. In the UK context, this doctrine has been applied by UK courts<sup>53</sup> to justify the reluctance of judges to deal with ‘political’ questions relating to public emergency, national security, national or general interest. As Lord Carswell put it, ‘a rule of abstinence should apply’ and the court should avoid interfering with what is essentially a political judgment<sup>54</sup>. This alignment is effectuated through the use of the interrelated concepts of necessity and general (or public) interest. The courts lack the democratic legitimacy and expertise to decide on what constitutes a national emergency and would abstain from reviewing measures considered necessary by the executive to deal with a crisis.

To return to our object of analysis, the form of the Memorandum itself facilitates this phenomenon since the very rationale for introducing the Memorandum is the crisis, as well as the urgent nature of the measures. The principle of conditionality, which accompanies the

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<sup>52</sup> These concerns are reflected in a Report conducted by J.P. Morgan Chase on the process of adjustment of the Euro area economies to the crisis, where Southern European Constitutions are seen as aberrations to the EU social acquis and as obstacles to growth and competitiveness. According to the report: ‘The crisis has made apparent that there are deep seated political problems in the periphery, which need to change if EMU is going to function properly in the long run. Constitutions tend to show a *strong socialist influence*, reflecting the political strength that left wing parties gained after the defeat of fascism. Political systems around the periphery typically display several of the following features: weak executives; weak central states relative to regions; *constitutional protection of labour rights*; consensus building systems which foster political clientelism; and *the right to protest* if unwelcome changes are made to the political status quo’ (Mackie & Barr, 2013).

<sup>53</sup> Indicatively see *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 [109], *R (Corner House Research) v Director of the Serious Fraud Office* [2008] UKHL 60 [23], *R (Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, as well as Thomas Poole’s assessment of the above cases under the prism of the category of ‘reason of state’ (Poole, 2015, pp. 262-291).

<sup>54</sup> See *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61 [130].

Memorandum, feeds to the above. Therefore, the form of the Memorandum itself necessitates the language of necessity and general interest which is vital to the phenomenon of judicial deference. In the context of the Greek crisis legislation, the question ‘Quis judicabit?’ re-emerges, as the judiciary recedes before the political judgment of the legislator and his technocratic adequacy, proclaiming him, thus, the original interpreter of the crisis. The aligning of the two distinct wills (that of the judge and that of the legislator) in this internal dialogue of the state is evidence of the unity of the state in reproducing the bourgeois rule.

Let us elaborate on this point. The unity of the two wills, i.e. of the will of the legislator and the will of the judge, is certainly not constant in a liberal constitutional democracy. In fact it is a broken unity, not only in ‘normal’ times, but also in times of ‘emergency’ as dictated by the principle of the ‘rule of law’. Such was the case in Judgment 2307/2014 of the Greek Council of State, which found unconstitutional a limited aspect of the labour-law regulations of the Second Memorandum, i.e. the unilateral recourse to arbitration. This is also evidence of law’s ‘relative autonomy’. Law cannot be reduced to a voluntaristic phenomenon; it is not identified with the arbitrary will of the ruling class, however influenced it may be by the latter.

Nevertheless, Panayiotis Pikrammenos, former President of the Greek Council of State, in an article explaining Judgment 668/2012 of the Court on the constitutionality of the first Memorandum, argues that the exceptional circumstances, which necessitate the judge’s decision on whether the divergence from legal normality is justified, do not put the judge himself in the position of the Sovereign, in the Schmittian sense of the term (Pikrammenos, 2012). Therefore, it is under this prism that we should assess the Greek case-law on the constitutionality of the Memoranda. The aforementioned Judgment 668/2012 adopted, according to Pikrammenos, many elements of the theory of the exception and the language of necessity.

In both this judgment and Judgment 2307/2014, on the constitutionality of the second Memorandum, it was held that reasons of ‘*overriding public interest*’ necessitated the loan agreement, and that full compliance with the principles of proportionality and necessity was achieved. According to the Court ‘*the measures were neither inappropriate, nor can it be proven that they were not necessary*’. They are ‘part of a larger program of fiscal adjustment’, and ‘*they serve the public interest and the immediate need to address the economic needs of the country*’<sup>55</sup>. So, according to the court’s jurisprudence there is in fact an emergency to be met. However, the measures introduced to deal with this emergency are not temporary, and certainly not exceptional.

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<sup>55</sup> See paragraph 35 of Judgment 668/2012.

They are, rather, considered as necessary measures, which form part of a larger program of fiscal adjustment, and they serve the public interest.

The fiscal-economic content of ‘public interest’ is here revealed, as ‘necessity’ consists in safeguarding fiscal balance and public wealth. The positivist approach towards this expansive interpretation of ‘public interest’ holds that the notion of public interest is expanded so as to include the fiscal balance and avoidance of economic disaster of the country (Karavokyris, 2014, p. 93). However, the dialectical analysis of the contradictions of capitalist society, the fundamental one being the contradiction between a socialised production process and the private ownership of the means of production, has already revealed the impossibility of any sort of ‘general interest’ in a class divided society.

Consequently, while it is undoubtedly true that the abstract notion of ‘public interest’ has to acquire historically different meanings, since its elasticity allows it to develop and adapt to the concrete juridico-political conditions (Karavokyris, 2014, p. 100), our analysis focuses on the ideological function of this notion as a legitimating force, which seeks to obfuscate the class divisions and create and sustain a false, albeit necessary for the reproduction of the bourgeois state, idea of social cohesion. On this basis, the social content of the ‘general interest’, and the ‘general will’ which seeks to satisfy that interest, is revealed as determined by the development of class struggle in a context of capitalist crisis. Additionally, it is argued that the crisis expedites the implementation of measures which have been promoted (at different levels of intensity due to the uneven development of capitalism) throughout the EU since the signing of the Maastricht treaty and the White Paper of 1993.

The form of the Memorandum has been criticised by certain Greek constitutional theorists. According to them, the Memoranda have amounted to a ‘loss of sovereignty, in the sense of actual power of drawing autonomous and independent public policies’ (Katrougkalos, 2011). Furthermore, the implementation of the Memoranda leads to the setting aside of fundamental constitutional provisions: ‘The new rules which implement the related policy guidelines form a ‘parallel constitution’ in the sense that they are contrary to many constitutional norms, including the fundamental principle of ‘Social State’’ (Katrougkalos, 2011). Ultimately, the exceptional and unconstitutional legislation of the Memoranda is seen as originating in the political project of Neoliberalism. These neoliberal policies have ‘diminished the national states’ regulatory and economic capacity of drawing economic policies’ (Katrougkalos, 2011).

This analysis is a useful starting point but it has to be expanded. The questions to be asked for a substantive enquiry of the socio-economic processes behind Neoliberal policies are: Who draws

these ‘neo-liberal policies’? Are they imposed upon national states by other foreign states? Or are they agreed upon on a different level than the nation-state level -remaining, thus, as removed as possible from actual popular scrutiny and decision-making, albeit serving in a direct way interests of internal, ‘national’ social groups? These questions suggest that our examination of the Greek crisis legislation cannot be limited to the national but has to take into account of developments at the supra-national (i.e. EU) level. This aspect of the analysis will develop in the next sections.

It is argued that the critical approach to the Memorandum legislation can benefit from taking account of the opposing view, which sees the Memoranda form as necessary and justified. This view, in seeking to justify the measures taken, invokes not the exceptional rule, but the necessity of the measures (Karavokyris, 2014). According to this line of reasoning, the voting of the Memorandum is regarded as an absolutely necessary choice of the legislator, as an action which is factually and legally unavoidable, under the pressure of (external) creditors and the (internal) economic situation of the country (Karavokyris, 2014). This view follows the Greek CoS which, as we saw above, in the decision 668/2012 on the constitutionality of the measures contained in the First Memorandum, decided that the measures ‘are not found to be inappropriate, and certainly not manifestly inappropriate, for the attainment of the identified objects; what is more, they cannot be considered unnecessary’ (para.35).

Consequently, in spite of arguments that the country is under a state of emergency imposed by the Troika, the legal facts, i.e. the valid ratification of the measures by the Parliament and the decisive judgment of the courts, prove the integration of the Memoranda regulations in a regime of constitutional legality (Karavokyris, 2014, p. 31). In addition to this, it is argued that the limitations on fiscal sovereignty stem not only from the programme imposed upon the Greek government by the Troika, its institutional creditors, due to its oversize sovereign debt and extreme deficit, but ‘simultaneously from the *obligation of compliance with the commitments undertaken by the Greek government becoming a Member of the Eurozone, and signing as a sovereign state the Maastricht Treaty, the Lisbon Treaty, and the Stability and Growth Pact*’ (Manitakis, 2011).

It follows from the above that the form of the Greek crisis legislation has to be examined alongside the developments at EU level, as well as together with the phenomenon of distantiation of decision-making processes from popular strata. Seeing the Greek crisis legislation as a unity of form and content means that understanding the Memorandum as a necessary legal form, both aggressive and exceptional, can happen only if equal attention is paid to the aggressive measures that this legal form accompanies. In the next section we look into the EU basis of the Greek crisis legislation, in order to substantiate our claim that the Memorandum reflects the Member States’

commitments under the main principles of the EU. The Memorandum is a form of implementation of these principles, which are themselves given a different content on the basis of class and intra-class antagonisms, and are concretised in other EU Member States, notwithstanding the absence of Memoranda of Understanding.

## II. The necessary content of the Memorandum

To unearth the socio-economic content of the ‘necessary’ measures introduced through the form of the Memorandum one has to begin by looking at their basis in EU legislation. European Union law is here analysed as a totality of rules and principles which relate to each other and are informed by a particular political conception of how social and economic relations should develop and be regulated. In that manner, the Memorandum is seen as a form of implementation of policies and principles found in EU legal and political documents.

It is argued that the European Union Law, the body of law which *resulted from the limitation of competence or a transfer of powers from the States to the Community*<sup>56</sup>, is a principled totality which consists of rules, principles and policies. It is also argued that some of these principles, which reflect a specific political conception of the way social and economic relations should develop, outweigh all others in a balancing process. The Weimar legal system, which was examined above, was shown to be more than a purely formal, liberal, democratic system based on the principles of the rule of law. The analysis in the previous sections and chapters showed the objective function of formal principles in reproducing a regime of power, property and productive relations. In the same manner, the EU legal system is a principled totality and its principles are based on a specific economic and political conception of society.

First and foremost, the EU legal system is governed by the principles of the four freedoms: the free movement of goods, persons, services, and capital. The fundamental principle of EU law is the creation of an internal market. However, this principle in itself is the result of a particular conception of what constitutes the ‘general good’ and what is in the ‘general interest’. This conception is based on a series of assumptions on the importance of free trade. The benefits of free trade can be summarised briefly -free trade allows for specialisation, specialisation leads to comparative advantage, and comparative advantage leads to economies of scale which maximise consumer welfare and ensure the most efficient use of worldwide resources (Barnard, 2010, p. 3).

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<sup>56</sup> See case *Flaminio Costa v ENEL* (1964) C-6/64.

Since no two countries are exactly alike in natural resources, climate, or workforce, trade allows each of them to concentrate on what they can do best and those differences give each country a comparative advantage over the others in the same products (Barnard, 2010, p. 4).

Of course this conception behind the four freedoms of the EU is based on a series of assumptions: the equilibrium of supply and demand, that buyers and sellers act rationally, are numerous, have full information about products on offer, can contract at little costs, have sufficient resources to transact, can enter and leave the market with little difficulty, and will carry out the obligations which they agree to perform (Barnard, 2010, p. 6). These assumptions do not reflect the realities of the highly contradictory and competitive capitalist market. For instance, the view that specialisation results in higher total productivity and, ultimately, free trade should lead to cheaper products for consumers (Barnard, 2010, p. 5), fails to take into account the socio-political and economic factors which determine the form of specialisation in the EU itself. Who decides on the specialisation and the specific intra-EU division of labour? Is it not determined by the principle of uneven development of capitalism and the profit-making competition which would urge enterprises or countries with absolute advantage in production to outrun all others?

Nevertheless, and despite their deeply political character, these principles permeate EU law as a whole and are mostly evident in those ‘hard cases’ which involve a balancing between more than one of them. An example of this can be found in the Court of Justice of the European Union (CJEU) jurisprudence and the shift of the Court’s focus when deciding on the compatibility of national measures with EU law, from equal treatment (discrimination test) to the removal of obstacles to access the host state’s market (market access test). With respect to freedom of establishment we see a greater preoccupation with ensuring that individuals and, increasingly, companies gain access to the host state’s market and do not suffer impediments once on that market (Barnard, 2010, p. 294). In *Gebhard* (case C-55/94), a case concerning national rules on the use of the title *avvocato* in Italy, the Court abandoned the language of discrimination and said that the national measures were ‘liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty’. Such rules breached Article 49 TFEU on freedom of establishment unless they could be justified (Barnard, 2010, p. 19).

The relative strength of the principle of the freedom of establishment over other principles is mostly evident in ‘harder cases’ such as those of *Laval* and *Viking*. More specifically, in two of the most important CJEU decisions on the relationship between national labour law provisions and fundamental EU principles, the place of labour law within the EU system of rules and principles was clarified. In *Laval* (C-341/05) and *Viking* (C-438/05) the CJEU held that the right to take industrial action is, on the one hand, a ‘fundamental right which forms an integral part of

the general principles of community law'. On the other hand, the Court held that the consequence of recognising that the right to take industrial action has its origins in community law is that the right can only be exercised in a manner that is compatible with that law. The important consequence of this is that 'the right is fettered in so far as it restricts freedom of movement and freedom of establishment such that where industrial action restricts freedom of movement or establishment, it will only be lawful if it is both justified and proportionate' (Orstein, 2008).

It is evident from the above that the freedom of establishment outweighs any other conflicting principle of the EU legal system. As a result, the economic content of EU principles conditions and qualifies the exercise of fundamental social rights, such as the right to strike. A point which can be raised on this basis is that, in the unity of EU economic, social and monetary principles, the economic ones are determinant. This is evident if one looks at Article 3 (ex Article 2) of the Treaty of the EU, which makes it clear that integration is pursued not as an end in itself, but rather as a means through which other -essentially economic- ends are to be realised (Syrpis, 2007, p. 51). The determinant role of economic principles is particularly evident with regards to labour-market regulation. Philip Syrpis, in his analysis of EU labour law, argues that 'if and when it occurs, labour market regulation may serve a variety of objectives; for example, the protection of the worker, the reduction of unemployment, or the generation of economic efficiency' (Syrpis, 2007, p. 3).

According to Syrpis, there are three distinct rationales upon which EU intervention in domestic labour law may be based; the integrationist rationale (aiming to improve the function of the market within Europe), the economic rationale (aiming to improve the performance of the European economy by encouraging growth, reducing unemployment, enhancing efficiency, and improving Europe's international competitiveness), and the social rationale (aiming to protect the workers). As evidenced in various EU legal documents and decisions, the economic rationale is ultimately prioritised over both the integrationist (which in the final analysis serves the main purpose of EU competitiveness in its struggle against USA, Japan, and as of yet China, India, etc.) and the social rationale (the protection of workers) and determines the content of any regulation.

Let us further develop this argument by looking at the recent opinion of Advocate General Wahl on a request for a preliminary ruling from the Greek Council of State. The legal issue arose on the occasion of a dispute between the Greek government and a cement company (*AGET Iraklis*) after a decision of the latter to proceed to collective dismissals of its labour-force. The question referred to the CJEU (Case C-201/15) concerned the compatibility of Article 5(3) of Law No 1387/1983 with Articles 49 TFEU (freedom of establishment) and 63 TFEU (free movement of



capital). In particular, article 5(3) of the above provision lays down as a condition for collective redundancies to be effected in a specific undertaking that the administrative authorities must authorise the redundancies in question on the basis of criteria as to (a) the conditions in the labour market, (b) the situation of the undertaking and (c) the interests of the national economy.

Advocate General advanced the opinion that the Greek legislation regulating collective redundancies is incompatible with Article 49 TFEU because ‘the rule at issue is not appropriate for the purpose of protecting workers and, in any event, it goes beyond what is necessary to achieve that purpose’ (para. 76). The reason he gives for his opinion is based on a value judgment on the relation between labour legislation and the protection of workers. The Advocate General opines that the rule at issue merely gives the impression of being protective of workers. In reality, according to the Advocate, this protection is only temporary until the employer becomes insolvent (para. 73). Therefore, the presence of an acute economic crisis accompanied by unusual and extremely high unemployment rates cannot justify restricting the freedom of establishment and the freedom to conduct a business, by restricting the rights of employers to enact collective dismissals (para. 78).

The Advocate General’s opinion is an example of how essentially political ideas about how economy should be managed inform the content of a judicial opinion. In fact, according the Advocate, the idea of a balancing exercise in this case is a fallacy: protecting the workers concerned is not at odds with either the freedom of establishment or the freedom to conduct a business (para. 74). The reason for this is that workers are best protected by an economic environment which fosters stable employment (para. 73). The Advocate’s opinion concludes with reference to the Third Memorandum introduced in the Greek legal order with Law No 4336/2015 and the political reasoning behind it: *in times of crisis, it is important to reduce all the factors which deter new undertakings from investing, as economic efficiency may help stimulate job creation and economic growth* (para. 80). The way to achieve these -and subsequently to protect workers from unemployment- is for Greece to ‘undertake rigorous reviews and modernisation of collective bargaining, industrial action and, in line with the relevant EU directive and best practice, collective dismissals’.

As a result, in order for the workers to be protected against unemployment, any protection against collective dismissals has to be forfeited. It is argued that the essence of EU law is presumed in the Advocate’s opinion as coinciding with a specific purpose: competitiveness, growth, and job creation as a result of the free enterprise of companies and the *reduction of all factors which deter new undertakings from investing*. The Advocate General is advancing a teleological interpretation based on the principles and policies of EU law. He arrives at the conclusion that Greek law fails

to protect from unemployment despite its declared intentions, because it is the opposite law that would protect from unemployment: *a law that protects not the employee but the employer*. The opinion of the Advocate General in Case C-201/15 *AGET Iraklis* consists of a value judgment of the labour law reforms which are introduced in the legal order of Greece and other EU Member States. It is an opinion informed by a particular political conception, which reveals the EU legal system as a principled totality whose telos is found in the principles of *growth* and *competitiveness* and the accommodating principles of *budgetary efficiency* and *flexibility*.

In fact it manifests that fiscal principles go hand in hand with labour law reforms. The principle of ‘growth’ translates into ‘investment’. And as we saw above, no enterprise will invest unless it is reassured that the production costs are reduced. Central among these costs that need to be reduced for an agreeable investing environment is the cost of labour. The way to reduce the cost of labour is by reducing the protection of workers, either through amending the legislation which regulates collective dismissals, or by changing the level at which collective bargaining takes place and moving it closer to the enterprise level, or through other means (such as reducing the possibility of industrial action). The same policies that would lead to growth are the ones providing a particular economic environment with a competitive advantage, according to the same politico-economic conception.

Of course the concretisation of these principles into distinct policies has to be examined in a dynamic, and not in a static, manner. Let us see how these principles relate to each other in the context of the Eurozone crisis and how they were deployed in the Greek crisis legislation. Firstly, the EU legal basis for the first loan to Greece, which was accompanied by the first Memorandum, was the Council Decision 320/2010/EU. The Decision was addressed to Greece ‘giving notice to take measures for deficit reduction judged necessary to remedy the excessive debt’. It was revised on the basis of article 5 (2) of Regulation 1467/97/EC, which provides that ‘if effective action is taken in compliance with TFEU 126(9) and unexpected adverse economic events with major unfavourable consequences for government finances occur after the adoption, the Council may decide to adopt a revised notice’. Therefore, the Council Decision 320/2010/EU was amended (with Decisions 486/2010/EU and 57/2011/EU) into a decision to provide stability support (in conjunction with multilateral assistance provided by the International Monetary Fund (IMF)) in form of a pooling of bilateral loans coordinated by the Commission, conditional on Greece respecting Decision 320/2010/EU’.

It is argued that the main justification behind the invocation of these exceptional provisions and the series of amendments is found in the fundamental EU monetary principle, i.e. *budgetary efficiency*. This constitutes the content of ‘necessity’. It is this principle, after all, that offered

justification for the breaking of the ‘no bail-out clause’. If the ‘no bail-out clause’ is the norm in the EU, then the Greek bail-out was the exception. The legal basis for the bilateral loans, as well as for the institutionalisation of the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM), was Article 122 paragraph 2 TFEU, according to which the ‘severe difficulties caused by exceptional occurrences beyond a Member State’s control’ may justify the granting of ‘Union financial assistance to the Member State concerned’. The Greek debt crisis falls under this exceptional provision, justifying recourse to actions which violate another Treaty provision, i.e. the no-bail-out clause of Article 125 TFEU.

Furthermore, in order to grasp the comprehensive justification of the granting of financial assistance, reference has to be made to the Pringle decision (C-370/12 *Pringle*) on the compatibility of the ESM with TFEU 125. Paragraph 137 of the Decision reads: ‘Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors *provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy*’. Here one locates a fundamental principle which forms the content of the ‘necessity’ met by the measures introduced with the Memorandum. The ultimate necessity, the primary goal is fiscal stability. A principle-necessity which the ‘Treaty on Stability, Coordination and Governance in the Economic and Monetary Union’ (otherwise known as the ‘Fiscal Compact’) sought to give binding force to, by requiring its ‘taking effect in the national law of the Contracting Parties through provisions of binding force and permanent character, preferably constitutional (Article 1, paragraph 2).

But this is only one side of this ‘necessity’. For, as we can see in both the ‘Fiscal Compact’ of 2012 and the aforementioned Regulation 1467/97, which concretises the rules of the ‘Stability and Growth Pact’ on the excessive deficit procedure, this principle is directly linked to principles of economic governance. Sound finances are merely a ‘means of strengthening the conditions for price stability and for strong sustainable growth conducive to employment creation’. The economic and monetary content of the ‘necessity’ which has to be met is located in the Preamble of the ‘Fiscal Compact’. The monetary and economic principles appear in their unity, albeit a *unity* determined by the economic goals of *growth and competitiveness*, which translates into less restrictive environment for the enterprises, more and sustainable profits for EU monopoly groups. Neo-liberalism there appears as a set of class-determined principles; as the ‘*need* for governments to maintain sound and sustainable public finances’; the ‘*need* to ensure that their general government deficit does not exceed 3 % of their GDP’; the *need* ‘to regard their economic policies as a matter of common concern’ (Preamble); consequently, the *need* of the Contracting

Parties ‘to work jointly towards an economic policy where, building upon the mechanisms of economic policy coordination’, in order to meet the ‘European Union's objectives for sustainable growth, employment, competitiveness and social cohesion’ (Article 1).

These necessary principles are promoted by the Memorandum due to the exacerbation of the socio-economic contradictions following the 2008 global financial crisis. We saw previously that the Greek CoS accepts the constitutionality of the measures introduced with the Memoranda and their basis on EU legislation. The Court invokes the notion of ‘supreme social interest’ in order to justify the constitutional compliance of the measures which contribute ‘to the reduction of *unemployment* and the enhancement of *competitiveness* of the national economy’<sup>57</sup>. The main EU economic principles of competitiveness and growth are presented, in their acceptance by the Court, as ‘supreme social interest’.

Therefore, ‘necessity’ is concretised in the form of the Memorandum and the content of the labour law reforms as part of a programme of internal devaluation, which is supposed to lead to growth and competitiveness (Lapavitsas & al., 2010, p. 364). The Memoranda of Understanding are here seen as a unity of form and content: a form of implementation (as is, for instance, the Open Method of Coordination) of a ‘*necessary*’ *content*, which itself changes on the basis of concrete antagonistic interests. The exceptional circumstances of the ‘unprecedented crisis’ justified the Greek bail-out, but the measures accompanying the bail-out are justified as necessary to fulfil a normal -oh, so normal- obligation of EU Member States, i.e. budgetary efficiency and a economic policy coordination to achieve growth and competitiveness. The aggressive and exceptional form of the Memorandum accompanies the equally aggressive measures which enhance competitiveness through depreciation of labour.

Therein is located the necessity of the measures. Both the concrete content of these measures and their form of implementation corresponds to the level of intensification of contradictions following the economic crisis, but the root of the economic policies and legislative choices of the Memoranda is found in EU ordinary decision-making. For this reason, it is pertinent to assess the EU economic principles of Growth, Competitiveness, and Employment in the White Paper of 1993, with particular focus on the employment policies and labour-market regulation. The main purpose behind this document was the assertion of the need for sustained economic growth which could be achieved through ‘changes in economic and social policies and changes in the employment environment as expressed in the structure of labour market, taxation and social

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<sup>57</sup> See paragraph 36 of Decision 2307/2014.

security incentives'. Central among these changes is the introduction of the principle of flexibility, as the more efficient means of reducing labour costs.

Lack of flexibility in labour-regulation -more particularly in terms of the organization of working time, pay and mobility- is identified in the White Paper as the root cause of 'what are relatively high labour costs, which have risen at a much greater rate in the Community than among our principal trading partners' (p.123). The main reason behind the White Paper is the assessment of the loss of competitive angle of European monopoly groups. This reason is cited as 'a contributory factor to the loss of jobs, particularly in labour-intensive or unskilled sectors' (p.124); as if it is not the internationalisation of the production process itself -as manifested in the phenomenon of off-shoring- which has led businesses to move their plants to countries where labour costs are extremely low because of the de-regulation of labour and the conditions allow intensified exploitation in ever-worsening working conditions.

In order for EU Member states and the EU as a whole to be able to restore its international competitiveness against low-wage countries, wages have to be reduced and the level of exploitation has to increase. This is the result of the deepening of the capitalist contradictions, essential phenomenon of which is the uneven development of the economies and the capitalist competition which leads to intensified class struggle between Capital and Labour. The need for the introduction of the class-policies of flexibility is reflected in the policies promoted in the White Paper. Policies focusing on 'removing obstacles which make it more difficult or costly to employ part-time workers or workers on a fixed-duration contract, and gearing careers more closely to the individual, or facilitating forms of progressive retirement'; on 'reducing working hours in a period of recession'; on 'gearing levels of pay to company performance and productivity'.

Flexibility is nominally aimed at countering of unemployment. However, the goal of reducing unemployment in reality stands for the true goal of reducing labour-costs, through the intensified exploitation of a wider labour-force. The reduction of unemployment, in this context, in actuality means the enhancing of the numbers of the reserve army capable of work, so as to lower the cost of labour. Part-time, temporary relations (as well as the introduction of educational schemes for the unemployed) favour the inclusion of previously excluded elements in the workforce, so that the abundance of supply and the increase of workers exploitation reduce the labour-costs.

Flexibility, thus, translates into measures which promote part-time and temporary contracts, performance-related wages, through the elimination of collective bargaining and the facilitation of dismissals during a period of recession. Precisely these measures, along with the principle of

flexibility, were introduced in the Greek legal system with the Second and Third Memorandum, according to the demands of the White Paper that they be reflected in national collective bargaining rules and systems (p.124). In particular, the Second Memorandum, apart from an immediate realignment of the minimum wage level (determined by the national collective agreement) by 22% (32% for young employees), provided for the elimination of unilateral recourse to arbitration; a maximum duration of three years for all collective contracts; revision of the ‘after effects’ of collective contracts (the grace period after the contract expiration is reduced to three months, after which, if a new collective agreement cannot be reached, remuneration will revert back to basic wage)<sup>58</sup>.

These measures have had an immediate and deep impact in the fields of labour law and private sector employment. The relevant provisions of the Memorandum, annexed to N.4046/2012 Act of the Greek Parliament and implemented through ministerial decision 6/28.2.2012, amend vital parts of N.1876/1990 Act<sup>59</sup>, the main document of Greek collective labour law. The elimination of the ‘after effects’, as well as the rendering useless of the tool of arbitration, have caused the precipitation of the pyramid of collective agreements (Petropoulos, 2012). The sectoral collective contracts of private sector employees and workers have expired and employees are forced to renegotiate individual or business contracts, with their wages forced to the minimum wage threshold<sup>60</sup>. Last but not least, more recent statistics show that in 2015 55.36% of the jobs created were under part-time or fixed-term contracts, whereas only 44.64% were with open-ended full-time contracts. In addition to this, 60% of the wage-earners were dismissed at least once from their jobs within 2015.

It is evident that the promotion of a flexible approach to labour law has led to the elimination of collective bargaining at the sectoral level and the proliferation of individual contracts and bargaining at the level of the enterprise. This in turn leads to the worsening of the working conditions, cuts in wages, and increase of uncertainty through the increase in the absolute and relative number of part-time and temporary contracts. Therefore, we can argue that the Second and Third Memoranda are the forms of implementation of strategic class-policies, developed as early as in the White Paper of 1993. It is argued, however, that the introduction of these measures in Greece and other European countries after the crisis of 2008 is ‘necessitated’ by the uneven development of capitalist economies and the intensification of socio-economic contradictions.

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<sup>58</sup> Section E.28 of the Memorandum of Economic & Financial Policies.

<sup>59</sup> N.1876/1990 was ratified unanimously as an organic part of the Greek Constitution concerning collective bargaining (Petropoulos, 2012).

<sup>60</sup> According to data from the Labour Inspectorate, until the end of May 2012, 84,772 individual contracts had been submitted with average earnings decline of 23.5%, as well as another 400 business contracts for 30,659 employees with an average pay cut of 24% (Inspectorate, 2012).

### III. Unevenness and reproduction

So far, from a more or less positivist standpoint, we tried to identify the relations between different principles by looking at the legal texts (even though the ultimate connection between these principles found in legal texts and the fundamental social contradiction between capital and labour was alluded to). We looked at the intricate relations that exist between ‘budgetary efficiency’, ‘growth’, ‘investment’, ‘labour reforms’, ‘flexibility’. We examined this totality of principles and saw how they relate to each other. What is missing from the above analysis is their inner connection: why and how do they relate to each other as part of a system? This can be provided by a Marxist analysis, which examines the functioning of these principles embedded in a system of contradictory social-class relations. This is what this section explores.

This analysis takes into account the uneven development of EU economies; the capitalist competition between capital fractions within the EU and between the EU and international competitors; the intra-EU contradictions and the division between ‘technological leaders’ and ‘technological laggards’; the restrictions imposed by the Economic and Monetary Union; the role of technological innovation in the creation of capitalist crises; the need for absolute surplus value extraction and intensified exploitation as the only way out of the crisis. On this basis, that EU law is a principled totality, where specific principles (such as the freedom of establishment), which reflect political conceptions about how an economy should develop, far outweigh other goals and principles (such the protection of workers), is explained by the fact that the EU was a capitalist project since its inception. Similarly, that freedom of establishment is such a principle which far outweighs all other can be understood in the context of capitalist unevenness and competition within the EU, where capitals seek the most favourable conditions to maximise their profits. Profitability is the reason why capitals move across national frontiers: ‘in their constant quest for the highest rates of profit, the most dynamic capitals seek access to (a) foreign inputs, labour power and financial capital, (b) foreign commodity markets and (c) foreign direct and indirect investment opportunities’ (Carchedi, 2001, p. 60).

Capitals need to trade, that is, exchange, simply because they need to realise the value contained in their products at the highest possible (rate of) profit. [...] They thus engage in a relentless fight for the world’s purchasing power, that is, for the world’s (surplus) value. International trade and capital movements are thus the manifestation of this fight. The outcome of this conflict is far from being *mutually advantageous for all parties involved*.

[...] Those capital units, and by extension those nations, which gain the most from all this are basically those which are already ahead of the others, usually the oligopolies in the so-called 'developed' countries. [...] Economic integration makes this greater freedom permanent. But it is neither an automatic nor a necessarily favourable outcome for everybody. Resistance to integration, far from being an irrational economic policy, simply expresses the interests of those who stand to lose from it (Carchedi, 2001, pp. 60-61).

It is, therefore, the clash of economic interests in the process of capitalist unevenness that determines the process of European economic integration. This has been the case from the origins of this process. It has been argued that the origins of the EU cannot be properly conceptualised without understanding the uneven and combined developmental terrain that it inherits and is constituted by, and further, that this terrain forms the very ground for the mutual but contradictory articulation of national and transnational conditions of capitalist accumulation (Sandbeck & Schneider, 2014, p. 859). Similarly, it is here argued that the latest developments (institutional shifts of the EU juridico-political framework and labour reforms introduced in all Member States) can be explained on the basis of unevenness and contradiction between national and transnational conditions of capitalist accumulation. Let us begin by looking at the historical roots of unevenness.

The argument has been made that the revival of European integration in the 1980s 'reflected the attempt by dominant capital fractions to force through comprehensive deregulation policies in the face of the crisis of Fordist accumulation strategies and to limit the scope of national Keynesian economic policies' (Sandbeck & Schneider, 2014, p. 850). Of course this process was not without contradiction, since other major European capitals had aimed to establish a defensive neo-mercantilist strategy to shelter European markets in the face of increasing global competition. However, the industrial and financial fractions that had organised themselves as the European Round Table (ERT) of Industrialists were ultimately able to set the agenda for a neoliberal integration project, seeking to respond to the external pressure of American and Japanese competitors and a perceived European decline (Sandbeck & Schneider, 2014, p. 850).

We see then that contradictions and competition between different fractions of capital within the EU, as well as between European capitalists and their American and Japanese competitors, were vital in shaping the post-1980s EU integration project. To be exact, then, and from a Marxist standpoint, the EU can be characterised as a capitalist project, and an imperialist one for that matter. Given the imperialist past and nature of the countries which had founded the European Economic Community, the body emerging from their integration could not but 'contain the same



seeds and develop into the same weed': 'It is hard to believe that colonial (imperialist) nations could join into a supranational body of a different nature' (Carchedi, 2001, p. 9).

Furthermore, the point has been made that this process of integration has been shaped by a further fundamental contradiction captured in the schema of 'core and periphery'. As we saw above, the very establishment of an EU project needs to be linked to the developmental goals and imperatives of certain dominant nation-state formations and their dominant class fractions, in terms of their attempt to forge competitive advantages over and above neighbouring European states (Sandbeck & Schneider, 2014, p. 860). These dominant class fractions among the dominant nations within the 'core' took the initiative of shaping the EU project in order to enhance their profitability through engaging in transnational forms of capitalist accumulation by reducing transaction costs, eliminating tariffs, promoting capital mobility and placing pressure on rising labour costs (Sandbeck & Schneider, 2014, p. 860). Moreover, and at different historical stages of this process, Member States from the so-called periphery decided to join the EU. This decision has to be assessed on the basis of the advantages afforded to domestic ruling classes both in terms of international competition and in terms of domestic reproduction. It has been argued that the decision of peripheral Member States to join the EU has to be seen as dominant capital fractions in these states 'engaging in a process of 'catch-up' and as an attempt of these fractions 'to employ the EU as a leveraging point for advancing their own economic goals, whether successfully or not' (Sandbeck & Schneider, 2014, p. 860).

Another related point has been made, namely that in the EU context, capitalist unevenness is reflected in a specific intra-EU division of labour, which dates back to the beginning of the -then- European Community. This intra-EU division of labour has been one of the strategic choices in EU's response to the competition with the USA, Japan, and more recently China and the other developing economies. The choice of this intra-EU division of labour was based on the judgment that the traditional sectors of European industry are going through a crisis, while other cutting-edge sectors (microelectronics, telecommunications, biotechnologies, etc.) can guarantee constant and growing international demand, satisfactory rates of profit and a monopolised structure of productive technology (Papadopoulos, 1994, pp. 30-31). Hence the powerful Member States chose to follow a methodically co-ordinated process of expanding the production of these sectors. In parallel, the least developed countries acquired the role of providing the rest of the Community with the surplus of agricultural and traditional (low-technology) industrial products, as well as that of trading-transshipping centres (Papadopoulos, 1994, pp. 30-31).

The community, in that manner, prioritised the economic goal of international competitiveness, while downgrading the goal of intra-European convergence of economies. The international

competitiveness of the EU, as well as the intra-EU competition, is translated into a series of class-oriented policies, which worsen the condition of Labour compared to Capital. It is necessary then that these policies are introduced on the basis of this intra-EU division of labour, albeit with differences as to the time and manner of their implementation, owing precisely to the unevenness of development of EU. For the EU and the Euro may facilitate the convergence of capitalist economies through the freedom of movement of capital, goods, services and labour-power, but each capitalist economy follows its own economic cycle, and the competition between them co-exists with their collaboration and is exacerbated in situations of crisis, despite their interdependence.

This intra-EU division of labour, and more specifically the division between ‘technological leaders’ and ‘technological laggards’ (rather than the one between core and periphery), will be useful for our analysis of the reasons why the capitalist-imperialist structure of the EU necessitates the measures for intensified exploitation of labour, which are introduced in the post-crisis context. It is pertinent here to elaborate briefly on a Marxist theory of capitalist crises, in order to set the context for the development of socio-economic contradictions. Marxist theory identifies technological development within capitalist relations of production as a fundamental cause of crises (Carchedi, 2001, p. 79). This means that crises are not due to under-consumption (overproduction) of use values, but to underproduction of (surplus) value due to technological innovations embedded in capitalist production relations (Carchedi, 2001, p. 81).

This phenomenon is intrinsically linked to the growth of the organic composition of capital. The latter refers to the relation of variable to constant capital. According to the Marxist theory of value, variable capital (the capital applied to the purchase of labour power) is where profit derives from, since only labour can create value and only surplus labour can create surplus value, therefore profit, for the capitalist. However, the fact that technological innovations are the major way for capitalists to compete within sectors -since technological innovations reduce the socially necessary labour time for the creation of a use-value (product)- means that the tendency is for constant capital to increase at the expense of variable capital. It can, thus, be argued that technological innovations adversely affect the rate of profit.

There are, therefore, sound reasons for accepting the thesis that technological innovations reduce the average rate of profit and are a major contributing factor to the eruption of crises, which are then manifested as: destruction of capital, i.e. bankruptcies, closures, unemployment; devalorisation of capital; destruction of capital as finished commodities; difficulties of realisation; financial, monetary and budgetary crisis as well as inflationary processes (Carchedi, 2001, p. 85). However, this is not an absolute law because capital tries to check this tendential fall

in the rate of profit, either through its inner working or through conscious policies (Carchedi, 2001, p. 85). Central among these tendencies (which may include fiscal and monetary policies among others) is the tendency to increase the rate of absolute surplus value, that is, greater intensity of labour and longer working days. This is a point of major importance as it explains the socio-economic content of the notion of ‘flexibility’, as well as the nature of the labour reforms introduced throughout the EU.

Let us further this analysis by returning to the terrain of unevenness and competition, and the main contradiction between more developed, technologically advanced, countries (i.e. their dominant capitalist fractions) and those less developed, technological laggards. For Guglielmo Carchedi, a country can be defined as a technological leader: where only one sector is considered, if its average productivity in that sector is higher than in other countries; where more than one sector is considered, if that country leads technologically in the major high-technology and innovative sectors (Carchedi, 2001, p. 102). According to the laws of capitalist development, the technologically innovative country (innovative exporters and through them all exporters and importers) is ‘rewarded’ for its increased productivity through the appropriation of more international value, that is, by shifting abroad its profitability difficulties (Carchedi, 2001, p. 102). However, the counter-tendency of this is a revaluation and appreciation of its currency. On the contrary, the country lagging behind is punished through a loss of value and thus by importing profitability crises (Carchedi, 2001, p. 102). The countertendency, here, would be a devaluation and depreciation of its currency. These counter-tendencies affect the leaders by the slowing down of their exports, whereas the laggards could see a similar increase in their exports, because of their depreciated currency.

What follows from the above is that in the antagonism between technologically advanced and less-advanced countries, the depreciation of currency may be a useful tool for the latter in order to appropriate that international value which cannot be appropriated through superior technologies. If the choice of currency depreciation is precluded, then ‘the technological laggards can resort to forcing their labourers to work longer and/or more intensively, thus achieving a higher production both of (surplus value) and of use values’ (Carchedi, 2001, p. 102). As is well known the Economic and Monetary Union (EMU) precludes currency depreciation as a measure that individual Member States can resort to. In fact this measure has been precluded even before the institution of the EMU, with the previous model of the European Exchange Rates Mechanism (ERM).

Carchedi argues that the fixed exchange rates served to solidify the dominance of the more developed, technologically advanced countries, and their leading fractions. The bloc of

technologically leading countries ‘appropriates value from the dominated bloc through the international prices system, in a systematic and permanent way, thus being able to accumulate capital and invest it in technological innovations and further reinforcing its technological lead’ (Carchedi, 2001, p. 122). This point has major consequences for Europe’s labouring classes. The EMU (as much as its predecessor, the ERM) forces technological laggards to extract more (absolute) surplus value at the point of production, instead of using redistribution mechanisms (inflation) (Carchedi, 2001, p. 138).

Since technological laggards had to renounce inflation and devaluation, their capitals had to compete through longer working days (or weeks) and higher intensity of labour, that is, by imposing *higher rates of absolute surplus* value at the point of production. This is achieved by the *dismantling of social security systems* and the *increased legal possibility of arbitrarily dismissing labourers*, nowadays called labour *flexibility* (Carchedi, 2001, p. 138).

These contradictions are exacerbated following the crisis. The effect of the EMU, apart from solidifying the interests of the technologically advanced countries and their most dominant capital fractions, is that the prescribed policies to deal with the capitalist crisis and counter the fall in the rate of profit are restricted to the extraction of absolute surplus value, through policies of intensified exploitation. European capital, in order to reproduce the conditions of its existence and dominance has to resort to policies of internal devaluation and intensified exploitation, i.e. the policies of deregulation of the labour market through the introduction of ‘flexibility’ that we examined in the previous section.

Of course this orientation towards intensified exploitation does not come without advantages to the technological laggards, too. There are certain advantages deriving to capital from the renouncement of inflation and devaluation for the purposes of monetary integration. First of all, absolute surplus value and intensified exploitation are to be preferred over inflationary measures, since ‘inflation corrodes not only labour’s income but also that of all other classes, including those which are traditional allies of capital, thus being a possible cause of generalised discontent’ (Carchedi, 2001, p. 139). Moreover, higher rates of absolute surplus value at the point of production ‘increase both the average rate of profit and the economic base (the production of value and of commodities) instead of just the former as is the case with inflationary measures’ (Carchedi, 2001, p. 139). Last but certainly not least, high rates of absolute surplus value at the point of production ‘foster an increased direct control on labour within the labour process itself and the (ideological, political and organisational) weakening of labour’s organisations’ (Carchedi, 2001, p. 139).

We can, thus, conclude that the extraction of absolute surplus value through intensified exploitation promotes not just the interests of the technological leaders or the most dominant fractions of capital. Intensified exploitation has direct benefits for the reproduction of capital in general, not only in economic terms, but also in social terms of weakening labour's organisations. It is the capitalist-imperialist structure of the EU and the capitalist contradictions, in which the process of EU integration is embedded, which explains the intricate link between monetary policies, budgetary efficiency and labour reforms focusing on 'flexibility'. Despite the uneven development of capitalist national economies, the Euro, and thus German leadership, is accepted by other European countries because the bill is paid by labour (Carchedi, 2001, p. 14). Of course this process of intensified exploitation, necessitated by capitalist contradictions as it is, does not come without effects on the form of exercise of public power. But before we analyse these, let us look at the particular labour reforms introduced in specific Member States according to 'best practice' for the benefit of capital.

#### IV. Flexibility and intensified exploitation

The uneven and spasmodic character of the development of individual enterprises, of individual branches of industry and individual countries, under the capitalist system leads to intensified capitalist competition between the different enterprises, industries and countries. These class antagonisms in the form of capitalist unevenness and competition are to account for the introduction of measures for 'flexibility' and 'growth'. In order for individual enterprises, industries and countries, to compete amongst themselves and with other antagonists they need to lower wages and increase exploitation. The intensification of intra-class antagonisms leads to intensification of class struggle. As we saw above, the structure of the EU was formed on the basis of antagonisms between the more or less developed and technologically advanced or less advanced countries, and their dominant fractions. And these antagonisms and structure necessitate the resort to absolute surplus value to restore the profitability of capital.

The principles reflecting these contradictory tendencies are manifest in the EU policies promoting the principle of 'flexibility', such as the facilitation of collective dismissals throughout the EU. This point makes necessary a comparative analysis of labour reforms throughout the EU, in order to substantiate the claim that intensification of exploitation is the prescribed response of capital to the eruption of crisis, and these measures are not country-specific or contingent upon the Memorandum, but have to be seen under a class prism. The constituting principle of the *AGET*

case is echoed in the labour law reforms of France, Italy and -probably- Greece. The main *ratio* of the Greek crisis labour legislation is to introduce flexibility in the labour market so as to ‘restore the competitiveness of the Greek economy’. This necessarily leads to the adoption of the measures which were assessed above and were introduced in the Greek legal order in the form of the Memorandum.

In fact Section E. 28 of the Memorandum of Economic & Financial Policies clearly states that since ‘the deep structural reforms will require time to fully translate into growth and the rigidities in labour market are preventing wages from adjusting to economic conditions, upfront measures are needed to allow reduction in nominal wages so as to rapidly close the competitiveness gap’. ‘Restoration of competitiveness and profitability’ is the proclaimed goal behind the policies of internal devaluation, which demand further weakening of labour protection, particularly through reducing trade union power; abolishing collective bargaining on wages; facilitating the entry of women into the labour force, especially in part-time and temporary jobs; removal of barriers into certain closed professions; reducing the tax burden on capital by introducing heavier indirect taxes; introducing privatization into the education system; and significantly raising the pension age (Lapavitsas & al., 2010, p. 364).

This standard prescription amounts to the full unfolding, and even intensification, of the underlying ideas of the European Employment Strategy (Lapavitsas & al., 2010, p. 364). Of course the adoption of these policies is not predetermined, despite the fact that it has so far been the standard prescription. Objections to whether these policies can lead to sustained growth of productivity have been voiced (see for instance, (Holland & Varoufakis, 2011), (Lapavitsas & al., 2010), (Krugman, 2012), (Krugman, 2015)), expressing different politico-economic conceptions of capitalist growth based on public investment and (neo-)Keynesian policies. Especially in the context of the Greek crisis, these alternative views were widely debated and were central in a process of an intense contestation of the model of austerity policies prescribed so far, following Syriza’s rise to power. This process, which was also a result of intensified contradictions, revealed rifts between Greece’s main creditors, i.e. the IMF and the EU.

A central point of disagreement, which showcases the intensified contradictions over the Greek programme -and to an extent over the future of the Union-, is the issue of the sustainability of the Greek debt. The IMF report on the sustainability of the Greek debt suggests the adoption further measures of debt relief, a prospect strongly resisted by the EU. In fact, the very presence of the IMF in the rescuing mechanisms (such as the European stability mechanism (ESM) formed in September 2012, around one-third of the financial resources of which come the IMF) is evidence of contradictory views as to the preferred way out of the crisis.

While the presence of the IMF in the Troika undeniably ensures the representation of American interests in the process of crisis management, a specific constellation of interests among the dominant European states has contributed to its inclusion. Whereas the German government was able to reduce its contributions to the mutual bail out mechanisms, which mitigated domestic resistance against the EFSF, France as the dominant representative of the southern economic bloc accepted the inclusion of the IMF because, unlike the ECB and the EC, the IMF was expected to insist on growth-stimulating measures besides austerity policies (Sandbeck & Schneider, 2014, pp. 851-852).

Notwithstanding these points of disagreement and potential contradiction, the IMF's report on the sustainability of the Greek sovereign debt reiterates the mainstream commitment to measures that safeguard the reproduction of the capitalist productive relations by reforming the legislation on collective dismissals and industrial action and worsening the position of Labour compared to Capital. In the report we read: 'As to broader structural reforms, *the further postponement of reforms to the collective dismissals and industrial action* frameworks to the fall of 2016 -overdue since 2014- and the still extremely gradual pace at which Greece envisages to tackle its pervasive restrictions in product and service markets are also *not consistent with the very ambitious growth assumptions* used hitherto' (IMF, 2016). The above shows that despite the existence of contradictions as to the way forward -austerity and neo-liberalist policies or neo-Keynesian policies targeting growth and investment- there is common agreement and commitment to the need for intensified exploitation through anti-workers' legislation.

The commitment of the European Union to policies of internal devaluation was confirmed once again in the Third Greek Memorandum, which was the result of the process of negotiation which lasted for seven months and culminated in the referendum that was examined in the previous chapter. Act No 4336/2015, which introduced the Third Memorandum in the Greek legal system, in a verbatim quotation of the Euro Summit Statement of Brussels, 12 July 2015, provides for 'the review of the existing frameworks in labour market, including collective dismissals, collective action and collective bargaining, taking into account *best practices* at international and European level'. That this review 'should not involve a return to past policy settings which are not compatible with the goals of promoting sustainable and inclusive growth' leaves no margin of misinterpretation as to the orientation of this review.

The recent reiteration of the commitment to prioritising the freedom of the capitalist enterprise in conducting its business over the protection that collective labour law affords the employees of a company in the Advocate General's opinion in the *AGET* case is also consistent with the

argument developed here<sup>61</sup>. It is argued that the commitment to these ‘necessary’ measures, which will lead to the restoration of competitiveness and growth by worsening the position of Labour compared to Capital, is expressed in the concept of ‘best practices’. These ‘best practices’ must be taken into account when reviewing the existing frameworks in labour market, including collective dismissals, collective action and collective bargaining. This important concept, which points towards the content of measures to be introduced in the form of the Third Memorandum, requires a comparative analysis of the labour law reforms adopted in other EU Member States.

It is a concept of importance for an additional reason: it confirms that the measures taken in the exceptional Greek predicament correspond to the general EU principles and prescribed policies. The concept of ‘best practices’ reveals the content behind the different forms through which these measures are introduced. To legislate on the basis of ‘best practices’ means to take into account the labour law reforms introduced in 2016 in France and in 2015 in Italy -i.e. in countries without Memoranda- to restore competitiveness. Therefore, it means that on the basis of uneven development and capitalist competition, the labour law legislation reaches a point of convergence necessitated by these conditions of intensified contradiction and expressed in the concept of ‘best practices’. It is pertinent to examine the measures introduced in France and Italy so as to substantiate this argument.

According to the 2016 labour reforms, the means to restore the competitiveness of the French economy is the reduction of labour costs through measures which re-organise the working-hours and collective bargaining. As far as the working-hours are concerned, the 35-hour week remains in place, but as an average. Firms can negotiate with local trade unions on more or fewer hours from week to week, up to a maximum of 46 hours per week and 12 hours per day, if this is required by the company needs and according to the contracts agreed at company level. This measure, which enables the intensified exploitation of labour, is accompanied by the adjusting of the preferred level of bargaining.

The law brings the French model closer to the UK one where bargaining takes place at the company level. This enables two things. On the one hand, companies have more ‘flexibility’ in deciding the terms required at each point of the economic cycle. On the other hand, the loss of mass participation in negotiations taking place at the sectoral or national level reduces the

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<sup>61</sup> Of course, *it remains to be seen* whether this commitment materialises into concrete policies. The concrete policies relating to this aspect of structural reforms of the Third Memorandum had not been introduced at the time of writing these lines. The process of consultation between different social partners had begun, but the actual materialisation of these policies would depend on the resistances met, either in the form of class struggle and popular resistance, or in the form of intra-class and intra-EU contradictions over the prescribed measures to deal with the general forecasts for anaemic growth in 2016 and the repercussions of the British vote to leave the EU in the referendum of June 23<sup>rd</sup> 2016.



negotiating power of the employees. The prioritisation of bargaining at company rather than sectoral level is complemented with the reform of the law relating to collective dismissals. These are facilitated by the reduction of the power of judges in matters of redundancies. So far, French judges could oppose lay-offs if the parent company, even if based abroad, was profitable. In the new legislation, a French subsidiary can cut jobs if its revenues have fallen for four consecutive quarters and if it has posted operating losses for two quarters. Judges would only verify the accuracy of the financial statements and no longer delve deeper into the reasons (Chassany, 2016).

The facilitation of collective redundancies and the adjustment of bargaining at company level result in the loss of negotiating power of the employees and increase the uncertainty of their working conditions by 'raising a Damoclean sword' over their heads. Therefore, firms are given greater freedom to intensify the exploitation of labour, by reducing pay, increasing the working-hours, negotiating holidays or maternity leave, etc. The means to restore competitiveness of the French economy are a prescription for intensification of the exploitation of labour. For this reason they were met with popular resistance and several weeks of protest. It is precisely this resistance which forced the government to pass these measures under an extra-ordinary procedure. The measures were passed under Article 49 paragraph 3 of the French Constitution, which considered a Bill passed without voting in Parliament, unless a resolution of no-confidence, tabled within the subsequent twenty-four hours, is carried out. This is evidence of extraordinary forms of exercise of public power being used in conditions of intensified social struggle and contradictions.

With regards to Italy, the main ratio behind the Jobs Act of 2015 was the re-boosting of the economy through the reduction of unemployment (which was up to 12,8% overall and 42% among workers under the age of 29) and precariousness. The policy of the Jobs Act was based on the mainstream politico-economic conception of labour market 'rigidities' -namely, strong trade unions, generous social benefits, high minimum wages, powerful insiders, or firing restrictions - as the main causes behind persistent unemployment and loss of competitiveness, which we saw reflected in the White Paper of 1993 (Caldwell, 2015), (McKay, 2014), (Fana, Guarascio, & Cirillo, 2015). The Act sought to improve the economy by establishing a more 'flexible' labour market which would entice employers to hire new employees by making dismissals less costly and burdensome to employers and introducing a new type of contract.

First of all, as far as collective dismissals are concerned, the Jobs Act amended Article 18 of the old legislation, which required that employers with at least 15 employees reinstate permanent employees who had been unlawfully terminated. Pursuant to the reforms, employers will only be required to reinstate employees who were unlawfully terminated for discriminatory or retaliatory

reasons, those subject to terminations which are null and void pursuant to statute, such as the termination of an employee on maternity leave, and in the case of non-written terminations. Employees subject to other unlawful terminations, such as ones for economic reasons, will only be entitled to compensatory relief, not reinstatement (Caldwell, 2015). However, monetary damages for unfair dismissal claims are now two months' salary for each year of service with a minimum cap of four months' salary and a maximum cap of twenty-four months.

Another measure which contributes to the freedom of enterprise of the employers is the facilitation of temporary contracts through the elimination of previous restrictions on their adoption - before the Jobs Act implementation, firms were allowed up to a maximum of 20% temporary over the total amount of contracts (Fana, Guarascio, & Cirillo, 2015). Furthermore, in order to reduce precariousness, the Jobs Act introduces a new standard for open-ended contracts (*contratto a tutele crescenti*) which includes gradual protections for new employees which increase with the employee's length of service (Caldwell, 2015). However, this type of contract, designed to become the prevalent contract in the Italian labour market, is, in fact, only nominally permanent since it allows extremely cheap layouts depriving workers of the reinstatement right.

Thus, a contradiction emerges between the Jobs Act's declared intention -stimulating permanent employment- and its outcome -encouraging the diffusion of a contract type which allows extremely easy layouts (Fana, Guarascio, & Cirillo, 2015). The facilitation of collective redundancies means that the new permanent contract is deprived of the substantial requirements of an open-ended contract. Additionally, the data inspection shows that the Jobs Act is failing to meet its main goals of boosting employment and reducing the share of temporary and atypical contracts. Instead, an increase in the share of temporary contracts over the open-ended ones is observed, as well as a raise of part-time contracts within the new permanent positions emerges. In fact, 63% of new workers -158 out of 253 thousands- in the first nine months of 2015 have a temporary contract, whereas the only increase in employment detected is characterized mainly by temporary contracts signalling that the increase in permanent contracts is mostly due to contracts' transformations and not to jobs creation (Fana, Guarascio, & Cirillo, 2015).

Of course this tendency of proliferation of temporary contracts is the result and desired outcome of the introduction of more 'flexibility' in the labour market for the purpose of intensifying the exploitation of the working-class. As we saw above this tendency is recorded in Greece too, where more than half of the new contracts in 2015 were temporary or part-time contracts. This tendency is also evident in Britain, an EU Member State which is not member of the Eurozone. 2,5% of the labour-power in Britain is employed under zero-hour contracts, which is the most flexible form of employment. Furthermore, with regards to Britain, where bargaining at the level

of enterprise is predominant, labour law focuses on different forms of securing capitalist productive relations. A brief assessment of the Trade Union Act of 2016 is required for a comprehensive understanding of the content of ‘best practices’ which are to be taken into account not only with regards to the regulation of collective dismissals but also with regards to industrial action.

As far as the latter is concerned, the Business Secretary justified the bill by saying it is ‘not a declaration of war’ against unions but necessary to stop ‘endless’ threats of industrial action. For this reason the Act introduces higher voting thresholds for ballots for industrial action. According to section 2, a 50% turnout of those entitled to vote is required for the decision for industrial action to be valid. In parallel, in important public services a further requirement of 40% support is added, rendering it even more difficult for industrial action to be taken in sectors of health, education, fire department, transportation, etc. It is evident from the above that the conditions of exercise of the right to strike -a right so vital for the needs and the negotiating power of workers- are worse than the previous regime which required a simple majority of those present in the ballot. Restricting the exercise of the right to strike is a necessary complement of measures which aim at the intensification of exploitation and result in the of worsening of the working conditions, since the exercise of this right as part of the working-class struggle could inhibit the normal functioning of the productive relations in their intensified form.

Of course, it has been argued that austerity policies and policies of liberalisation cannot be understood if we do not consider the leading role of German capital (with its internal contradictions) in the EU context. In fact the pressures on pay and working conditions in Germany, a result itself of capitalist unevenness and competition, are to account for the ‘competitive edge’ and ‘growth’ of German economy, and are considered a crucial reason which informed the Eurozone crisis. It is no wonder, then, that conservative commentators in the press have remarked that the sovereign debt crisis ultimately derives from peripheral country workers receiving higher increases in compensation than German workers, leading to a loss of competitiveness. This is true, but also misleading. For, the real problem has not been excessive compensation for peripheral workers but negligible increases for German workers, particularly after the introduction of the euro (Lapavistas & al., 2010, pp. 338-339).

Therefore the competitive advantage of the German economy informed the EU response to the crisis, through the introduction of similar measures, which would restore competitiveness by intensifying exploitation, to other EU Member States. In this context it should be noted that the term ‘mini-job’ was coined in Germany. It is a form of marginal employment that is generally characterized as part-time with a low wage. According to the latest law, the monthly income of a

mini job is less than 450euros, exempting them from income tax (Blankenburg, 2012). According to the figures of the German Employment Agency, 7.3 million Germans, or one in every five employees, held ‘mini-jobs’ in September 2010 -an increase of 1.6 million since 2003. The number of workers taking ‘mini-jobs’ as additional side-jobs to make ends meet almost doubled from 1.3 million in 2003 to 2.4 million in 2010 (Blankenburg, 2012).

It is, thus, apparent that the ‘best practices’ and their basis on EU principles are more than plain technical arrangements to support the euro as common currency, as well as world currency. Rather, they have profound social and political implications. They promote the interests of capital by intensifying exploitation, through the fostering of liberalisation and the consequent worsening the position of labour compared to capital. These best practices are responding to intensified contradictions and are not exceptional, but, rather, necessary for the reproduction of conditions that ensure capital’s profitability. We can now turn to the effect these measures and the contradictions that necessitate them have on the public legal form, of both national states and the state project of the European Union.

## V. The EU public legal form

The previous section analysed the crisis legislation and the labour reforms as necessitated by the capitalist structure of the EU and the need to intensify exploitation, in the context of capitalist uneven development. Crucial for this analysis was a series of antagonisms, expressed in the schematic dualisms of ‘core and periphery’, ‘more developed and less developed countries’, ‘technological leaders and technological laggards’. These dualisms, in the Marxist discourse, are embedded in a systematic analysis of imperialism focusing on the theory of dependency. According to this theory, the capitalist world is subdivided into two blocs of countries, the dominant and the dominated, or dependent, ones.

The imperialist centre dominates the dependent bloc of the periphery through the appropriation of value inherent in the system of international prices. The reproduction of this self-reinforcing process is ensured by international institutions and appropriate institutional arrangements as well as by military power if need be (Carchedi, 2001, p. 115). On this basis, the argument extends the existence of imperialist relations to relations between blocs of countries and not just between individual states: imperialist relations exist not only between some imperial powers and some dominated countries; they also exist between the imperialist bloc as a whole (the centre of

capitalism, the developed countries) and the dominated bloc (the periphery, the underdeveloped countries) either for some countries individually or as a whole (Carchedi, 2001, p. 121).

What are the implications of applying this thesis to the EU context? Can it be argued that austerity is imposed by the dominant countries of the core to the dominated countries of the periphery? Is the relation between the two blocs and neo-colonial relation? It is rather problematic to characterise the relations between EU countries as neo-colonial ones, as this would entail viewing the EU as a set of institutions that one-sidedly reflect the interests of the dominant countries. Such a mechanistic interpretation should be replaced by a more nuanced, dialectical conception, which takes into account that these supranational institutions -at least in the case of the EU- albeit representing the interests of dominant states, promote these interests against non-dominant, but capitalist states nonetheless.

The analysis of imperialism falls outside the scope of our thesis. However, it has to be noted that the capitalist mode of production is predominant in all social formations that exist globally, with only a couple of arguable exceptions. In that sense the figure of an imperialist pyramid, formed by all countries which participate in this, might be more helpful to illustrate the contradictory relations between conflicting national and transnational capitals based on different nation-states. Accepting the usefulness of this figure or not depends on the answer to the following question: Is imperialism the highest stage in the development of capitalism, or is it simply identified with 'imperialist policies', in the sense of the ability of a bourgeois state to promote in a dominant manner in the world market the interests of its own monopoly capital, on the basis of its (economic, political, military) power? In the second case the notion of imperialism will extend to characterise only a handful of states found at the top of the imperialist pyramid. In the first case, imperialism is seen as a historical stage in the development of capitalism, with almost every country participating in the imperialist pyramid; a strong dominant group at the top, dominated countries at the bottom and several countries at the intermediate stages.

It is argued that this figure may help account for the development of capitalist relations of production even in dependent-dominated countries, whose dominant domestic fractions of capital, because of the functioning of the laws of capitalist accumulation, will seek to increase their profitability and promote their interests in every way possible. In fact, the tendencies examined in the previous section show that capital fractions in the so-called 'dominated' countries try to benefit from contradictions (through depreciations of their own currencies and increase of exploitation, and taking advantage of the decrease of profitability and appreciation of dominant countries' currencies) in order to strengthen their own position in the imperialist pyramid. It is, thus, argued that separation between blocs of countries should not be taken as

absolute; on the contrary, the previous analysis showed that relations between core and periphery, or developed and less developed countries, have to be set in a context of unevenness and global strife for better positioning of countries and their dominant capital fractions in the imperialist world.

This dynamic conception allows us to better grasp the German leadership hypothesis. It is undoubtedly true that, within the EU, it is the German oligopolies which lead in the technologically advanced sectors, and thus in the rest of the economy (Carchedi, 2001, p. 123). But this does not imply Germany's absolute power to impose its policies. Rather, *various fractions of national capitals express their interests through state and supra-state institutions* which must not only negotiate and mediate these contradictory interests, but must also articulate them with those of other classes and fractions of classes and defend this complex of interests against the interests of non-EU countries (Carchedi, 2001, pp. 136-137). In fact, in the context of our case study, the Greek capitalists consent to the strategic choices of dealing with the crisis. *The big industries have been demanding further measures in the line of austerity and integration of the liberalisation of markets, most importantly the labour market, which would lead to profit-increase, since 1992* (Papadopoulos, 1994, pp. 30-31). A determining factor for this consensus is the strategic choice of Greek capital for fast and easily attainable profits through the lowering of labour costs, without further investing on technological updating or reorientation towards the production of high technology.

The recognition that capitalist ruling classes of countries in both the core and the periphery (or the top and bottom of the pyramid) express their interests through state and supra-state institutions makes it necessary to look at the mediating role of the EU, as well as to how unity and cohesion of different capital fractions is achieved at the EU supra-state level. The question then is: how can capital, especially big capital, have such an overpowering influence on the nature and working of the EU institutions? The answer given by Marxist analysis is that this is achieved through 'a highly efficient web of lobby groups which parallel similar groups in the various national realities and which can exercise their influence because the Council's and Commission's members are very receptive to their messages' (Carchedi, 2001, p. 31). What follows relates to the EU public legal form and the issue of 'democratic deficit'.

The issue of the democratic deficit has been central in EU constitutional theory and the various attempts to address this deficit have been enshrined in different EU Treaties -the latest example being the Lisbon Treaty, which recognises national parliaments in the EU institutional matrix and increases the powers of the European Parliament by establishing the co-decision process as the 'ordinary legislative procedure'. The problem, as posed by formal legal theory, concerns the role

of representative institutions in the EU decision-making process. It refers to the phenomenon of distantiation of these processes from the popular strata, but mostly in the sense of the transfer of power from national legislatures to the Council of Ministers of the EU, which comprises of members of national executives. This issue is intertwined in the mainstream analysis with questions about the division of competence between the EU and individual Member States, questions concerning democratic and technocratic legitimacy, as well as the relation between economic and political integration (Follesdal & Hix, 2006), (Majone, 1998), (Wincott, 1998), (Weiler, 1995).

For a Marxist analysis of the issue of democratic deficit, however, the focus is not on the power relation between the different EU law-making institutions, i.e. the technocratic and supranational Commission, the intergovernmental, executive branch of the Council, and the representative European Parliament. The focus is rather on the privileged access of distinct social interest groups to the Commission's proposals. Carchedi's analysis of the issue of democratic deficit -albeit written in 2001 and not in a position to account for the latest developments in EU institutions addressing this issue- is still very relevant, because of its class perspective. For Carchedi, 'insufficient democracy in decision making within the EU goes much further than the relation between the Parliament, on the one hand, and the Council and the Commission, on the other, concerning the acceptance, modification and rejection of European directives and regulations' (Carchedi, 2001, p. 29). The co-decision process takes place once a proposal has already been written, crystallised and submitted for consideration by the institutions. In this proposal 'the boundaries of the discussion are already set, that is, some interests are already represented while other have been excluded a priori' (Carchedi, 2001, p. 29).

The question which is even more important from a Marxist standpoint then is: which social groups influence the content of the legislation submitted by the Commission, and manage to have their interests inscribed in the Commission's proposals to the detriment of other groups (Carchedi, 2001, p. 29)? On this basis the EU decision-making process is to be seen as a process of negotiation between two sets of actors. On the one hand there are the EU institutions (Council, Commission, Parliament); and on the other are 'those lobbies, basically representing national capitals' interests, powerful enough to influence both politicians and Eurocrats within the European institutions' (Carchedi, 2001, p. 29). Seen under this light, the complex EU law-making process starts with the prioritisation of some interests, to the detriment of other interests, in the Commission's proposals; and it ends with the negotiation between the Commission, the Council and the Parliament (a negotiation in which the same lobbies weigh heavily) as to the final form taken by that legislation (Carchedi, 2001, p. 29).

Under this prism, amending the Treaties and giving extended powers to Parliament is far from filling the democratic deficit, since the notion of democratic deficit itself is insufficient. The issue of the democratic deficit can only properly be understood as the class orientation of EU legislation, because of the privileged access of European large corporations to the EU decision-making mechanisms. In fact, it has been argued that the familiar ‘no demos’ thesis that has shaped the process of European political integration is at the heart of ordoliberalism, i.e. the tradition of authoritarian liberalism that emerged towards the end of the Weimar Republic as a response to the then crisis of capitalism (Bonefeld, 2015, p. 876). The ordoliberal conception of an authoritarian liberalism, which was referred to in the previous chapter, presupposes the control of a strong state over popular masses so as to ensure the unrestrained economic activity of capital. Therefore, the absence of a ‘demos’ serves the de-politicisation of socio-economic relations, which is a prerequisite for the ordoliberal conception of capitalist development supported by a strong state.

The democratic deficit is, thus, not a design fault. Bypassing democratic processes is seen as an inherent and structural characteristic of the European project. This is the case from the beginning of the European project and it is still the case in the context of the crisis legislation which concerns us. Certain interests are prioritised to begin with. It should not be forgotten that the first step towards the EU, the European Coal and Steel Community, was born at the initiative, and to foster the interests, of oligopoly capital, that is, French and German coal and steel capital. The interests of large corporations, organised in many cases in transnational groups, have continued to shape in a predominant manner the process of EU integration in most of its stages.

Perhaps the most influential of all these groups is the European Roundtable of Industrialists (ERT), which was founded in 1983. The ERT is a forum bringing together around 50 Chief Executives and Chairmen of major multinational companies of European parentage covering a wide range of industrial and technological sectors. Companies of ERT Members are widely situated across Europe, with combined revenues exceeding €2,250 billion, sustaining around 6.8 million jobs in the region. The ERT was formed with the expressed intention of reviving European integration and shaping it to the preferences of European transnational corporations, and has been a driving force behind all the major reforms since the 1980s, and, more specifically, behind the institutionalisation of neo-liberalist policies within the EU, advocating for policies, such as the internal market, the Trans-European Networks, as well as policies on growth, competition and employment (Carchedi, 2001, p. 31). The latter concern us directly, since in the autumn of 1993 the ERT prepared its report ‘Beating the Crisis’. In December of the same year, Delors’s ‘White Paper on Growth, Competitiveness and Employment’ was released. The two



reports were prepared in close cooperation between the ERT and the Commission and ‘are strikingly uniform in their calls for deregulation, flexible labour markets and transport infrastructure investments’ (Carchedi, 2001, p. 32).

The ‘handbook’ for dealing with the crises, by ‘enhancing competitiveness, growth and employment’ through flexibility, i.e. the White Paper of 1993, was drafted in close cooperation with this major transnational group of industrialists. It is no wonder, then, that in it the long-standing requests of (not only German, but also Greek) big capital for austerity and deregulation of labour relations are reflected. It can, thus, be argued that there is a symbiotic relation between big capital and EU institutions. As a result, a Marxist analysis has to take into account that ‘the interests of transnational capital are not merely articulated and institutionalised at the level of the nation-state, but constitute a new form of statehood in the EU’ (Sandbeck & Schneider, 2014, p. 863). The Greek legislation and the events necessitating, accompanying and following its introduction (such as successive governmental crises in Greece, divisions within the Greek ruling block, austerity packages, successive electoral battles, one referendum, as well as intensified class struggle in the form of strikes and protests) cannot be interpreted merely as expressions of contradictions that are internal to the Greek social formation and state.

Rather, this points to tensions that emerge not only within the Greek national state, but traverse the wider institutional matrix of the EU. It is here argued that the solution to the crisis enshrined in the Greek crisis legislation (as much as in other EU Member States as was shown in the previous section) is class-oriented, favouring capital’s interests (of its dominant, developed and advanced fractions, and to a considerable extent of its dominated fractions as well) all across the EU; and despite the introduction of such measures at nation-state level, there is a common, EU-wide, agreement (encapsulated in the concept of ‘best practices’ and shaped by the law of uneven and combined development) on the content of these measures.

The above analysis has shown, albeit in a non-exhaustive manner, how cohesion and unity of capitalist interests is achieved at the supra-state level, through a highly efficient web of lobby groups and transnational organisations of capital which enjoy privileged access to EU decision-making mechanisms. It is essential to note that EU institutions do not reflect one-sidedly the interests of big capital. Similarly to national institutions, EU institutions are the arena in which different interests clash (Carchedi, 2001, p. 34). Consequently, they also perform a mediating role between conflicting interests. As Carchedi puts it, they ‘broker different and often contrasting interests and mould them into a common position acceptable to everybody, but ultimately functional for the retention by oligopoly capital of its leading role’ (Carchedi, 2001, p. 34). This mediating function, evidence of the relative autonomy of these institutions, has the additional

advantageous effect of obfuscating the capitalist nature of these institutions, therefore, performing an important function of containing social (class) strife.

Such an attempt of a class analysis of supra-state institutions has to grapple with an essential contradiction: the contradiction between the ascendancy of supranational authorities and the continuous relevance of sovereign nation-states. This contradiction, which manifests itself in the socio-political developments following the crisis (e.g. the rise of parties advocating nationalist, protectionist policies, denouncing globalisation, withdrawing from international agreements and organisations), is constitutive of capitalist accumulation in a transnational terrain that has been historically structured by uneven and combined development. This contradiction has its basis on and is a manifestation of the competing tendencies between the internationalisation of productive process and the national composition of capital.

The contribution of Marxist theory in this context is that it recognises that the forces which give rise to the modern nation-state, as well as to transnational institutions, are the same. The reason for this is that the reproduction of capital's conditions of production is best fulfilled at nation-state level, but they are combined with a tendency for internationalisation, as a manifestation of the law of accumulation of capital. The point was raised by Poulantzas that 'the dominance of the interior bourgeoisie continues to be articulated at the level of the nation-state, within which it is tasked with maintaining the reproduction of the capitalist relations in their economic, political and ideological dimensions' (Sandbeck & Schneider, 2014, p. 857). However, these 'tasks and interventions are increasingly externally oriented, such that the state undergoes significant modifications which give the appearance of a transfer of state functions to supranational institutional forms' (Sandbeck & Schneider, 2014, p. 858). It can, therefore, be argued that 'under capitalism, there can be no transnational without the persistence of the national (Sandbeck & Schneider, 2014, p. 858).

On this basis, the Marxist interpretation of the process of EU integration can be seen as mediating between the so-far dominant but conflicting interpretations, i.e. the neo-functionalist and the intergovernmentalist approach. The neo-functionalist approach sees the formation of supranational elites and interest groups as the motor behind the process of EU integration, because of the loyalty transfer of these groups, which results in a gradual diminution in the role of individual nation-states and a shift to technocratic negotiations at supra-state level. The intergovernmentalist approach, on the other hand, sees the continuing centrality of nation-states as the force which determines this process through cost-benefit analyses which determine participation in the EU (Sandbeck & Schneider, 2014, p. 856). As Sandbeck and Schneider have shown, a Marxist analysis can help mediate between these conflicting interpretations of EU

integration, and, thus, make sense of the conflicting tendencies of transnationalisation of crisis resolution and decision-making processes and the persistence of the central role played by nation-states. A synthesis of the two is conceivable if we take into account that EU integration is a capitalist dynamic, and we re-imbed this process of integration in the broader context of transnationalisation of capitalist dynamics. Nation-states are still relevant, as capital reproduces its conditions of production primarily at this level. But the law of capitalist accumulation and the expansive nature of capital mean that the interests of transnational capital are not merely articulated at the level of the nation-state, but constitute a new form of statehood in the EU.

## VI. Necessity and contingency of form and content

From a Marxist standpoint, this new form of statehood has been characterised as a state project. This notion may prove useful for an analysis of the ways in which unity and cohesion of different fractions of capital is achieved in the EU context, because it allows two things. First, it allows us to conceive the multiple scales of condensations of interests in the EU. European statehood is understood as ‘a heterogeneous ensemble of state apparatuses that are located on multiple scales: it is comprised not only of apparatuses that are transnational in nature, such as the EC or the European Parliament, but also of specific apparatuses that are formally assigned to the national level (i.e. national governments, ministries, etc.)’ (Sandbeck & Schneider, 2014, p. 863). At the same time, the notion of ‘state project’ allows us to conceive the developing and contradictory nature of this multiscalar statehood, the final form of which is not yet established, but has to be understood as a contested process in the making (Sandbeck & Schneider, 2014, p. 864).

These two characteristics determine the response of this state form in the aftermath of the crisis. It has been argued that the sovereign debt crisis consolidated the authoritarian statism of the European state project. According to Poulantzas, authoritarian statism refers to a restructuring of the state, through which popular strata and representative institutions (legislatures) are increasingly sealed off from decision-making processes, and ‘the power to fix norms and enact rules is shifting towards the executive and the state administration’ (Poulantzas, 2000, p. 219). Authoritarian statism, thus, signifies the transformation of the state form, which accompanies the need to distantiate decision-making centres from the popular strata and restrict access of the latter to the former. This change in the form of exercise of public power accompanies most processes of intensification of exploitation, an example of which was examined in the previous chapter concerning mid-war Germany.

The new element that the EU public legal form adds to this process of enhancing authoritarianism is the multiscalar nature of shifts. In order to restrict the accessibility of popular strata, the EU state project allows power to be shifted not only horizontally, but also vertically. The nodal points of policy elaboration and decision- therefore do not shift only from the national parliaments to the executive state apparatuses and the administration (horizontally), but also from national to supranational level (vertically). The process of authoritarian statism is ‘shaped by scalar strategies that aim at sealing off popular forces from decision-making processes by flexibly altering the scalar nodal points of policy elaboration so as to take the line of least resistance’ (Sandbeck & Schneider, 2014, p. 865).

Of course, this process of strengthening authoritarian elements of government, affects the combination of national and supranational institutions. In this context the latter may wish to influence and shape the former. Such an example is manifested in the aforementioned Fiscal Compact of 2012, an intergovernmental treaty concluded in the context of the EU, aiming at the constitutionalisation of austerity. In fact, despite being entirely detached from European law, this treaty ‘aims at inscribing austerity regulations of the tightened Stability and Growth Pact into the constitutional foundations of the individual European nation-states’ (Sandbeck & Schneider, 2014, p. 853). This treaty signifies an attempt to combat constitutional provisions, which the dominant capitalist fractions may find problematic with regards to their profitability, at the supra-state level.

It is pertinent here to make reference to the report ‘The Euro area adjustment: about halfway there’, commissioned by J. P. Morgan and conducted by the Europe Economic Research, in order to show how economic interest groups assess constitutional documents and outline changes necessary for the promotion of these interests. This report assesses the progress of individual Member States in their ‘journeys of national level adjustment’, in terms of competitiveness adjustments, household deleveraging, bank deleveraging, structural reform, and national level political reform. The Report concludes that there are deep seated political problems in the periphery, which need to change if EMU is going to function properly in the long run. These shortcomings are constitutionally enshrined, like, for instance, the constitutional protection of labour rights, or the right to protest if unwelcome changes are made to the political status quo. There are historical reasons for these shortcomings, according to the report, as ‘the political systems in the periphery were established in the aftermath of dictatorship, and were defined by that experience’. Therefore, ‘constitutions tend to show a strong socialist influence, reflecting the political strength that left wing parties gained after the defeat of fascism’ (Research, 2013, pp. 12-13). The light-hearted, but firm, conclusion that the road to ‘recovery’ and ‘growth’ has to go

through ridding constitutional texts of any forms of social welfare and social rights is strangely - but understandably on the basis of the above analysis- reminiscent of the similar requests of big capital in mid-war Germany.

In this context, the Fiscal Compact is evidence of this authoritarian turn, but it is certainly not the only one. In the aftermath of the crisis there has been a series of similar institutional shifts which reflect the intensification of socio-economic contradictions, such as the European Financial Stability Facility (EFSF), the ‘tightening’ of the Stability and Growth Pact, and the Euro-Plus-Pact (EPP). We have already referred to the EFSF and its successor, the ESM, which is tasked with providing loans to the countries on the verge of defaulting. It has been argued that, ‘more than simply constituting a technical ‘financial facility’, the EFSF was turned into an important political vehicle for the implementation of austerity packages designed under the aegis of the Troika and imposed on crisis-ridden member states (Sandbeck & Schneider, 2014, p. 851). Similarly, the granting of loans by the permanent ESM is conditional upon agreeing to the austerity demands of the (Sandbeck & Schneider, 2014, p. 852).

As far as the SGP is concerned, its ‘tightened’ version includes an effective sanction mechanism which ‘shall be triggered automatically’ and which is equipped with a ‘preventative arm’, allowing for sanctions against member states whose public debt exceeds 60 per cent of gross domestic product. This mechanism can, thus, be viewed as a ‘gradual bypassing of the budgetary rights of European national parliaments and a strengthening of executive state apparatuses, in this case especially of the European Council’ (Sandbeck & Schneider, 2014, p. 852). Last but not least, in the EPP, the Eurozone members agreed to pursue national economic policies that focus on the ‘fostering of competitiveness’ and the ‘sustainability of public finances’. Of course, and in line with our analysis above, the Member States have to achieve these goals by measures which intensify the exploitation of labouring classes, such as ‘the throttling of wage increases and the ‘adjustment’ of the retirement age to demographic developments’ (Sandbeck & Schneider, 2014, p. 853).

The above is evidence of a move towards an authoritarian constitutionalism, which accompanies the emergence and consolidation of a new cycle of authoritarian neoliberal integration, detached from democratic control. It is also evidence of the emergence of a new form of ‘permanent Memorandum’ which extends throughout the EU. The form of the Memorandum is, thus, revealed as an example of this tendency to resort to more authoritarian forms of decision-making, where technocrats need to work undisturbed in order to ‘solve’ the crisis for the ‘benefit’ of the general populus. If the interests of big capital (in both dominant and less dominant countries) are prioritised, the public legal form has to be insulated from popular unrest, indignation and

resistance, by becoming as distant as possible from the popular strata. It also has to appear as promoting the ‘general interest’, by invoking the technical nature of these policies and measures, as well as the urgency of their implementation.

The Memorandum is the form of implementation of the strategic choices of (Greek and European) Capital in the Greek legal system. Based on fundamental EU principles, the Memoranda and the laws implementing them do not constitute an exceptional or extra-EU commitment, but an execution on behalf of the Member State of their EU obligations. These obligations secure the reproduction of capitalist productive relations in their intensified form, demands which existed before the crisis. In fact, various analyses have shown that even before the crisis, ‘proponents of laissez-faire approaches (including the IMF, the Organisation for Economic Co-operation and Development (OECD) and World Bank) had urged Greek governments to promote far-reaching labour market reforms’. These recommendations were ‘usually in line with the collective bargaining demands of the largest employers’ association in Greece, the Hellenic Federation of Enterprises (SEV), over the past two decades’ (Dedousopoulos, 2012).

Examining the socio-economic content of the measures allows us to see their ‘necessary’ character; a necessity corresponding to the objective socio-economic contradictions of capitalism: uneven development and capitalist competition generate demands for restoring competitiveness and profitability, through reduction of labour-costs and intensification of exploitation; a demand that, during a capitalist crisis, is expressed in many and different forms because of the intensification of social (not only class, but also intra-class) antagonisms. Every capitalist crisis brings with it the need for destruction of capital and productive forces. This need is expressed in policies of ‘internal devaluation’ and reduction of labour costs.

The dismantling of the system of collective bargaining and arbitration, introduced with the Second Memorandum, is in line with the policy of ‘internal devaluation’, and, thus reflects this fundamental need of capital. In fact, the structural reforms undertaken in line with the loan agreements have been based upon the assessment that Greece had some of the strictest employment protection legislation amongst the OECD countries, and was, therefore, in dire need of a more ‘flexible’ system of labour law on its way back to ‘growth’ (Koukiadaki & Kretsos, 2012, p. 279). This ‘flexible system’, as concretised, among others, through the elimination of unilateral recourse to arbitration and the confinement of arbitration only to the determination of the basic wage/salary (excluding the introduction of any provisions on bonuses, allowances or other benefits) was consistent with SEV’s argument that compulsory arbitration should be

abolished so as to allow negotiations to be ‘better aligned with reality’ (Koukiadaki & Kretsos, 2012, p. 276).

Consequently, both form and content ‘in the last instance’ serve to introduce measures which worsen the condition of Labour compared to Capital, and are necessitated by the capitalist unevenness and competition, which is intensified in situations of crisis. Therein lies their ‘necessity’: in their class-orientation. As a result, the invocation of the ‘general interest’ by the bourgeois authorities serves in reality to obscure the intensification of exploitation and the class-orientation of the measures. As we saw above, the conflicting social interests of different social classes cancel out the generality of the concept of general interest.

However, neither is the content of those necessary measures fixed, nor is the form of their implementation; this is due to the contingent nature of the developing contradictions. Their specificity is determined by the level of intensification of social antagonisms, i.e. class struggle and intra-class conflict. The analysis so far has not been based on a mechanistic materialism, but rather on a dialectical one, mindful of the contradictory movement of social, economic and political reality. Legislation is not seen as the necessary reflection of the one-sided interests of a ruling class which acts as a metaphysical subject. On the contrary, we have focused on the existence of objective contradictions intensified by the development of capitalist antagonisms, which inform the principles deployed to deal with a crisis and the form assumed in the exercise of these powers.

It has already been noted above that the policies of ‘internal devaluation’ do not come without adverse effects for the functioning of the capitalist market, as they lead to the hindering of demand, and the problem of valorisation of surplus-value. This symptom of the contradictions of the capitalist mode of production is expressed in the conflicting demands of the capitalist class, as the demands for reduction of labour-costs are in conflict with those requiring the strengthening of internal demand. Evidence of this conflict can be found in the nuances between 1993 ‘flexibility’ and the 2000 ‘flexicurity’, which introduces ‘security’ -albeit in a manner accompanying the economic goals of capital- alongside ‘flexibility’. The updating of the main principles of EU economic policies is affected by the level of intensification of class and intra-class contradictions<sup>62</sup>.

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<sup>62</sup> For a defensive analysis of the principle of ‘flexicurity’ which nonetheless shows how capitalist contradictions and the general law of capitalist accumulation have informed this principle, see (Flaschel & Greiner, 2012). For a more critical analysis of the principle of flexicurity as evidence of further casualisation of working relations see (Schmidt, 2005).

The same goes for the changes in the public legal form. The tendency to strengthen the authoritarian elements of the state results in the weakening, as well as the strengthening, of the state. According to Poulantzas, authoritarian statism marks a dual tendency towards the ‘strengthening–weakening of the state’ (Poulantzas, 2000, p. 205). The state in its authoritarian statist form thus increasingly engages in direct and open confrontation with particular class interests and popular forces, which makes its partial character ever more visible (Poulantzas, 2000, pp. 213, 231, 245). The state, thus, is weakened in its capacity to act as a relatively autonomous mediator, which formulates long-term compromises between the dominant and the dominated classes. Specifically, with regards to the EU state form and national state forms of its member states, the strengthening of authoritarian elements of decision-making by distancing these processes from the popular strata may be considered among the factors contributing to the rise of nationalism and Euroscepticism. These developments have to be taken into account, in order to understand any future changes in the public legal form.

Of course, this understanding stresses the need for a Marxist analysis of legislation and its content. The form and content is *dynamic* and reflects the contradictory development of the capitalist relations of production, which give rise to competing interests reflected and mediated at both national and supranational level. So, the fact that austerity and policies of internal devaluation have been *so far* the prescribed policies of capital for recovery from the crisis *does not* mean they constitute the only way out for monopoly interests. For the reasons examined above, which relate to the profitability and competitiveness of capitalist economies, the content of the measures has so far been based on the prioritisation of policies of internal devaluation over policies of investment and providing the market with stimulus.

Nevertheless, the programme of quantitative easing promoted by the ECB has been pointing to another direction. This tendency might be reinforced by the recent report from the Organisation for Economic Co-operation and Development (OECD) which calls for less austerity and more public investment which would boost demand<sup>63</sup>, on the basis of its assessment for weak global growth in 2016-2017. Of course this will not necessarily entail the amelioration of the conditions for intensified exploitation of labour. According to the OECD, much more progress is needed in the EU with regards to ‘structural’ reforms in order to boost investment and productivity. Capital

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<sup>63</sup> ‘The Interim Economic Outlook calls for a stronger policy response, changing the policy mix to confront the current weak growth more effectively. It points out that sole reliance on monetary policy has proven insufficient to boost demand and produce satisfactory growth. The Outlook suggests that a stronger fiscal policy response, combined with renewed structural reforms, is needed to support growth and provide a more favourable environment for productivity-enhancing innovation and change, particularly in Europe’ (OECD, 2016).



is invested where the conditions for profit-making are more favourable, i.e. where the conditions for the extractions of surplus value are more favourable.

If the content of the ‘necessary’ measures is *not fixed*, but corresponding to and determined by the level of intensification of social antagonisms, neither is the form of their implementation. The Memoranda have been used as forms of implementation of these ‘necessary’ policies in several EU countries (Greece, Portugal, Ireland, Cyprus), in the context of the crisis. The intensified contradictions which emerged after the crisis necessitated this change in form of implementation, for the reasons examined in this chapter. The ‘shock therapy’ accompanying IMF programmes was accompanied with the legitimacy provided by the acknowledgment of the measures’ ‘necessity’ and constitutionality. But the intensification of contradictions might also give rise to new forms of implementation and -not coordination anymore, but- supervision.

A point to be raised with regards to both the ‘necessity’ of the measures and the contingency of their form of implementation on the basis of the above analysis is that such class-oriented measures are introduced in all EU countries, on the occasion of the capitalist crisis and the inability to foresee growth at any point in the future. In these countries these ‘necessary’ measures are introduced, despite the absence of ‘Memoranda’, albeit in different forms in each of them. In France, for instance the labour law reforms met with strong resistance by the working-class and the popular strata and the reforms were adopted with the use of an extra-ordinary procedure. Furthermore, and as was discussed above, the development of the crisis leads to institutional shifts and different forms (EPP, FC) and the Memorandum itself, as form of implementation, is accompanied and enabled by these shifts (EFSF, ESM). This point confirms the need for a different kind of analysis, a dialectical analysis of form in its unity with content, if we are to assess these measures in a critical manner.

In conclusion, the second part of our hypothesis that the change in the form of exercise of public power corresponds to different levels of intensification of socio-economic contradictions was shown to be true in the Greek context, since the form of the Memorandum and the content of the measures were shown as ‘necessitated’ by the level of intensification of capitalist competition and class-struggle. Of course, the reference to class struggle as a negating process renders the above analysis dynamic, by anchoring it in the reality of economic, social and political praxis. The outcome of legislation is not pre-determined. The legal form and content is *contingent* upon the clash of social forces. Austerity might be replaced by neo-Keynesian policies concentrating on fiscal stimuli and public investment. The recent forecasts for anaemic growth over the next years might prompt the EU and national authorities to prescribe a different ‘pharmakon’ for the resolution of the irresolvable capitalist contradictions. Measures of a different content will be

promoted then. Last but not least, these measures might be introduced through a new mechanism of implementation; a mechanism based on the principle of the ‘ever-closer Union’. Whether a ‘pharmakon’ of a different form and content can be a cure rather than poison remains doubtful, but it will ultimately depend on the development of capitalist contradictions.

Last but not least, the concept of class struggle in the above analysis included not only the international and intra-EU antagonisms and competition between different capitalist enterprises, industries and economies; it also included the fundamental contradiction between Capital and Labour contradiction. It thus pointed towards a theme that was developed throughout this study, namely the issue of democracy not only as form of exercise of public power, but of democracy as actual power and input of the popular strata over the organisation of a regime of power, property and productive relations.

## Conclusion

### From Political Theology to political economy

This Chapter concludes the thesis. It summarises its findings and the points raised, and addresses the thesis's two main hypothesis. This chapter also elaborates on a conceptual pair which, albeit not examined in detail, was alluded to and formed the underlying theme of our analysis: the conceptual pair of democracy and dictatorship. This thesis dealt with the issue of the public legal form. In doing so, it attempted to perform a move from political theology to political economy. In fact it provided a bidirectional analysis of the public legal form, which was examined in its historical specificity, as well as in its relation to socio-economic development. The role of the public legal form in the reproduction of contradictory, class, social relations was examined.

It was argued that the public legal form assumes a dualistic form, which is essential to sustain the unity of the constitutional order, based on the oneness of an abstract people. This oneness presents a fictitious image of unity of a class-divided society, by abstracting from the contradictory socio-economic content in order to contribute to its reproduction. Furthermore, it was argued that the changes in the public legal form itself correspond to the intensification of socio-economic antagonisms and take place in order to contribute to this reproduction more effectively. On this basis we examined, albeit in a non-exhaustive manner, the concepts the public legal form consists of, as well as their specific function and development. This was examined in Chapters Two and Three, which focused on the internal aspect of this bidirectional analysis, i.e. the internal unity of concepts and principles in their historical specificity. Additionally, Chapters Four and Five examined concrete cases of application of these principles, in processes of change in the form of exercise of public power.

Chapters Two and Three examined the dualistic form of public law, i.e. the tendency for public law to appear in pairs which sustain the oneness of sovereignty. This dualistic form was analysed on the background of its role in the facilitation and reproduction of capitalist social relations. In particular, the internal part of the analysis of the public legal form began in Chapter Two, by looking at the objective need for a new source of authority in the transitional period from feudalism to the establishment of capitalist social relations. At a high level of abstraction, it can be said that the feudalist order was premised on hierarchical relations, and knowledge and acceptance of these by the mass of the population. On the contrary, in capitalist society, everyone is formally equal and this formal equality has to be sustained by abstracting from socio-economic inequality. The foundation of bourgeois society is the abstract, classless individual.

Dualisms, which sustain the oneness of sovereign power by abstracting from the contradictory social content, provide the new regime with legitimacy and contribute to the reproduction of a system of power, property and productive relations. On this basis, the unity of concepts was examined in their origin and historical development, with focus on the social function of these fictions (and not illusions), and their role in the process of legitimating the exercise of public power. The ‘legal subject’, the ‘objective legal order’ and the ‘people’, are essential developments in the public legal form, since the source of authority is no longer divine. The source is rather the human individual, together with an amorphous mass of individuals (people). This establishes the first dualism of subject and object, which sustains this oneness and unity of the class-divided social whole by abstracting from class-divisions.

This unity is reflected in the abstract notions of the ‘people’ and the ‘general interest’, whose promotion serves as ultimate justification of legislation (normal or exceptional). The dialectics of the dualistic form and the oneness of the people is first spotted in the politico-theological fiction of the King’s Two Bodies, which is analysed as the original form of constitutionalism (limited government) and democracy (body politic). It is then repeated in the theory of the social contract, in the fundamental dualism between private individual and public legal order. Therein, Hobbes’s and Locke’s unity in difference was analysed on the basis of the recognition of property as the content of the dualistic form. It was argued that the same premise leads these two thinkers to different but compatible conclusions, because the primary goal of securing property relations is reflected in their theoretical constructions, but responding to different social stimuli.

The last instance of dualistic form discussed in Chapter Two is the dualism between objective law and subjective law, or between objective legal order and subjective rights. This was done on the basis of Hans Kelsen’s attempt to purify law from politics, by eliminating the form of the legal subject, as well as its content to be found in its property, and dissolving subjective right to objective norm. According to Kelsen’s fiction, the legal subject is an aggregate of obligations. To this fiction of reducing subjective decision to objective norm, Carl Schmitt answered with another fiction of his own: the fiction of a decisionistic and irrational will, separated from objective reality and mystifying its origins in said reality, which is now the source of the sovereign order and structure.

The analysis of the social function of the fictions constitutive of the public legal form continued in Chapter Three, with the notion of the general will. This fiction, too, served to replace divine will as source of authority. A genealogical inquiry revealed the metaphysical traits of this notion, namely its infallibility and its free nature. Our analysis asked the question ‘why the will needs to appear as free’, in order to analyse the free will as a mechanism of assumption of responsibility

by an amorphous people. It then moved on to question the general will's infallibility. The general will combines a volitional and a normative element as it is based on the axiom 'what the people will is always right'. However, the major exponent of the idea of the general will, Jean-Jacques Rousseau, admitted that the general will is always right, despite the fact that the people at large may sometimes err. The question then is: How can the general will always be right, if the people sometimes err? Who corrects the error of the people? To answer this question a concrete case of expression of the general will was examined: the Greek referendum of July 2015.

The executive, in the role of the ruler, is charged with correcting the error of the people, by acting as the *Katechon* and holding back the Apocalypse. In the case of the Greek referendum, the Greek government held back the Apocalypse of exiting the Eurozone by correcting the 'error' of the people's vote in the referendum. In this manner, the relation of representation and the dependence on the question posed acted as a filter to ensure that the will does not err. This points to a more general argument raised with regards to the role of representative institutions in a class divided society. For instance, the question 'should the focus of the economy shift from the pursuit of profit, 'competitiveness' and 'growth', to the satisfaction of social needs' will never be referred to the people, because it would threaten the very regime these democratic institutions function to reproduce. A general will answering 'yes' to the above question would *err* in an exemplary manner. It would err from the standpoint of the institution itself. It is like dividing by zero. In mathematical equations there are qualifications to avoid this devastating, system-threatening option. Similarly in representative democracies, constitutional concepts and institutions function to prevent options which would threaten their own reproduction, and consequently the reproduction of the regime of power, property and productive relations. To take a very limited example, the Greek constitution prohibits a referendum to be held on fiscal issues. Majority voting in affairs that directly affect the distribution of wealth are prohibited, let alone questions that relate to the production and appropriation of wealth itself, i.e. the issue of the mode of production. In that sense, the general will is the outcome of the whole process: the people deciding, the ruler interpreting. The general will is always right because of the representative nature of the institutions.

Chapter Three continued with the analysis of the notion of constituent power as source of modern political authority. This notion arguably captures the relation of the people to the law, and is characterised by another metaphysical trait, its inexhaustibility. There have been recent attempts to theorise this notion as pointing towards the constant redefinition of the constituted power. Constituent power and constituted power are united in temporal sequence to sustain a polity. It has also been argued that constituent power can be translated into a mechanism guaranteeing that

consent is obtained, or that dissent is expressed. These approaches signify a move beyond oneness of sovereignty, towards the constant redefinition of the constituted order.

However, it was argued here that any process of negation has to be determinate, not abstract. Otherwise constituent power remains an abstract notion which insulates the public legal form from the concrete social content. The crucial question here is 'who is the carrier of constituent power'. Chapter Three continues the examination of the analytical qualities of this concept by focusing on the work of Antonio Negri. It is argued that Negri's notion remains one-sided, since it refers to fragmented events rather than historical processes, and it is based on the 'irrational force of desire' rather than on class struggle and socio-economic relations. His notion of constituent power is conflating revolutionary and counter-revolutionary processes, through its metaphysical eternal occurrence. It was, thus, argued that the notion of constituent power remains within the constellations of fictions constitutive of the public legal form.

Having examined the main concepts constituting the public legal form and their specific social function, the analysis moved in Chapters Four and Five to the second hypothesis here advanced, namely that the change in the form of exercise of public power is contingent upon the intensification of socio-economic contradictions. Chapter Four began this analysis with a discussion of the unity in difference of norm and exception. It was argued that normal and exceptional forms of public power function to reproduce same relations but correspond to different levels of intensification of contradictions. The crucial question then is: what makes the change in the form of exercise of public power necessary?

On this basis, the concept of necessity was analysed, following an elaboration on Giorgio Agamben's 'state of exception' and Mark Neocleous's 'state of emergency'. Necessity was used in its capacity as both a legal term and an analytical term. It was used so as to refer to the continuity of public legal forms and their relation to socio-economic content. A dialectical notion of necessity was put forward on the basis of Hegel's analysis of the *Notrecht*. This notion captures the conflicting interests in a class-divided society, by juxtaposing what is necessary for the propertied classes (i.e. the protection of their property), to what is necessary for the propertyless (i.e. the need of man to feed himself and violate property to do so, in Hegel's analysis). The conflict of interests in a class-divided society cancels the possibility of existence of a 'general interest' as the content of 'necessity' and 'salus populi' is revealed as relative to class position and contingent upon the intensification of socio-economic contradictions. For different parts of the population the 'general welfare' may either mean the protection of private property, or the violation of private property.

The chapter moved on to examine a concrete case of a change in the form of exercise of public power, namely the change from Weimar form to Nazi form necessary. The question examined was: 'what made this change necessary?' It was argued that the change in the form of exercise of public power is explained by looking at the intensified socio-economic contradictions of mid-war Germany. The analysis revealed the precariousness of the welfare-Weimar form, as long as the contradictions of the capitalist social formation were intensified, to the extent that the public legal form could not accommodate the need for intensified exploitation. On this basis it was argued that despite the progressive nature of the Weimar form, the reproduction of the conditions of capitalism to which it contributed, eventually led to its demise.

The Weimar form comprised of many contradictory elements, as it tried to reconcile welfare provisions and socialist aspects with liberal democracy. The Weimar form was a manifestation of a move from the theretofore dominant abstract individualist form, to a more substantive public legal form, which recognised classes and social groups besides individuals. This was captured in the famous article 165, which had laid the foundations for mechanisms of class collaboration and compromise, such as the workers councils and the principle of the 'works-community'. Reference was made to the works of Hugo Sinzheimer, Otto Kahn-Freund, Ernst Fraenkel, and Franz Neumann, in order to show that the corporate form of Weimar sought to address the issue of imbalance of power in capitalism, through the establishment of 'economic democracy' and through the constitutionalisation of labour relations.

However, it was argued that one fundamental question was neither posed, nor addressed: what is the root of the imbalance of power between capital and labour? The issue of ownership of the means of production was never addressed. The (welfare-corporate) Weimar form aimed to right the injustices but not in an absolute manner. It addressed the epiphenomenal issue of wealth distribution, but left untouched the issue of wealth production (and ownership). The limited role of councils (which were not supreme law-making institutions giving full power to workers and labouring classes, but economic institutions aiming to put an end to unilateral decision-making in the workplace) was evidence of this.

For a fact, this form improved substantially the lives of the toiling classes, through the regulation of labour relations, recognition of social rights, benefits, establishment of social security. But it simultaneously contributed to the reproduction of capitalist relations of production, by never questioning and addressing the fundamental condition for the reproduction of these: the issue of private ownership of the means of production. What is more, the reliance of labouring classes on the state to provide, rather than on their autonomous struggle to achieve their goals, ultimately led to the deflating of labour movement. So, the welfare-Weimar form remained as long as it did not

threaten reproduction. But, having recognised classes, social rights, and benefits for the exploited classes, the Weimar form could not contain the forms of intensified class-struggle and reproduce the capitalist relations, when the need appeared for intensified exploitation and extraction of absolute surplus value in the aftermath of the Great Depression.

The need for intensified exploitation and the extraction of absolute surplus value meant that the hard won rights of labouring classes had to be done away with. The reproduction of fundamental contradiction of capitalism by the Weimar form eventually led to its demise. On this basis the change to the Nazi state form was necessary to fulfil the crucial function of reproduction of the capitalist relations of production. And this capitalist essence of the Nazi state form was captured in both Fraenkel's 'dual state' and Schmitt's 'qualitative total state'. The new elements of this form were that it dealt efficiently with the internal enemy, by crushing the labour movement and its organisations so that exploitation could increase. The strengthening of authoritarian elements was bound to be reflected in both state structure and state theory. The role of public law concepts and mechanisms (such as plebiscitarian legitimacy and principle of identity between ruler and ruled) in this process was examined, with a focus on the shifts and continuities in Carl Schmitt's theoretical apparatus.

If in the case of mid-war Germany the need to reproduce the conditions for the extraction of absolute surplus value meant that the labour movement had to be crushed and the welfare form had to be done away with, in the case of crisis ridden Greece, the need to intensify exploitation meant the introduction of flexibility in labour market. On this basis, the unity of form and content means that socio-economic and political contradictions are to account for the change in the form of exercise of public power. The welfare form is contingent upon the eruption of a capitalist crisis. The public legal form is contingent upon intensification of capitalist contradictions. The form of the Memorandum is necessary because it ensures the efficient implementation of the measures found therein, due to its invocation of emergency and necessity.

The crucial question then is: Why and for whom are the measures necessary? This is what Chapter Five examined, as it analysed the Greek crisis legislation as unity of form (Memorandum) and content (anti-labour measures). The Memorandum and the measures it implements were found 'necessary and not disproportionate' by the Greek council of state. The necessary content of the Greek crisis legislation is sought in EU law, as well as in socio-economic contradictions. The basis of the Memorandum on EU law made necessary the examination of socio-economic and juridico-political developments at supra-national level, too. In the case of the Greek crisis legislation, measures are agreed on a different level to remain as far removed as possible from popular scrutiny and decision-making.



On this basis, the relation between different EU principles was examined. From an EU standpoint, the content of general interest was found to be identified with the principles of ‘budgetary efficiency’, ‘growth and investment’, which translate into increase of competitiveness and the reduction of the cost of labour. From a class standpoint this translates into the increasing exploitation and the production of absolute surplus value, to create conditions which enable the profitability of capital. Necessity was thus shown as relative to class-position and dependent on the intensification of contradictions. The chapter continued with a class analysis of the inner connections and social function of these principles.

The EU was examined as a capitalist project since its inception, embedded in a context of uneven development and contradiction between competing capitalist fractions and (more dominant and less dominant, technologically leaders and technological laggards) countries representing their interests. The need for the extraction of absolute surplus value was explained through a Marxist theory of crisis as deriving from the capitalist structure of the EMU, which was established to crystallise the dominance of the leading capital fractions of the core, and prohibits inflationary policies. However, it was shown that rather than the EU institutions reflecting the interests of the more dominant countries of the core, dominant class fractions participate together with their less dominant counter-parts in shaping EU policies. EU institutions mediate this process and ensure cohesion and unity. So that the structure of EU is formed on the basis of antagonisms between more developed and less developed countries and their capital fractions. These antagonisms and structure necessitate the resort to absolute surplus value.

The above helped explain the EU-wide tendency towards labour reforms focusing on introduction of flexibility. A comparative analysis of the recent labour reforms in Italy and France, with brief reference to Germany and UK, led to the analysis of how these contradictions affect the form of exercise of public power at national and supranational level. Since contradictions shaping and being shaped by the Greek crisis legislation are not internal to the Greek social formation, the public legal form was examined at both national and supranational level. The EU public legal form was seen as shaped by the EU integration process, which was carried by interests of large capital. In this context, the Marxist concepts of ‘relative autonomy’ and ‘mediation’ were used in order to show how various fractions of national capitals express their interests through state and supra-state institutions.

The problem of the democratic deficit of the EU was discussed not as a problem internal to the power relations between the EU institutions (Council, European Parliament, Commission), but as a problem concerning the relation of all these institutions to a highly efficient web of lobby groups. The privileged access of distinct social interest groups to Commission’s proposals was

identified as a central problem, as it revealed the role of specific interests groups (of European and Greek industrial capital) in the conception and adoption of the White Paper of 1993 where the principle of flexibility was introduced. The problem of the EU public legal form then is that certain interests of large capital are prioritised to begin with. As a result, bypassing democratic processes is an inherent and structural characteristic of the EU, as is the strengthening of authoritarian elements of government accompanying the rising contradictions. And the EU public legal form affords the dominant capital fractions the opportunity of choosing different paths of least popular resistance, by shifting the decision-making power both horizontally (from legislature to executive institutions), and vertically (from national to supranational institutions).

This strengthening of authoritarian elements, so as to accompany measures that intensify exploitation, lies behind not only the form of the Memorandum, but also behind the institutional shifts of the EU itself as a result of the crisis (with the tightening of the Fiscal Compact, the Euro plus pact and the mechanisms of EFSF and ESM). The constitutionalisation of austerity from supranational to national level reveals the content of necessity as specifically class-orientated. And the Memorandum was revealed as the form of implementation of measures corresponding to intensified contradictions. Consequently, the hypothesis that the change in the form of exercise of public power corresponds to different levels of intensification of socio-economic contradictions was confirmed.

## Democracy and dictatorship

In the context of the move from political theology to political economy a few concluding remarks and points for further investigation can be made with regards to the compatibility or not of the concepts of democracy and dictatorship. This thesis was written in the context of an economic, social and political crisis. As a result it could not fail to pay attention to the facts of this social and economic reality. Since 2008 unemployment in Greece increased dramatically from 8% to 25%. Youth unemployment in the years of the crisis is steadily over 50%. These numbers would be even higher had it not been for the 427,000 migrants who left Greece during the same years. In the meantime wages have plummeted. 58,8% of the wage-labourers earn less than 1,000 Euros per month. What is more, the tendency is for further lowering the already low level of wages. Of the 85,000 newly created job positions in 2015 44% are awarded wages of up to 400 Euros monthly, another 44% are awarded between 400 and 800 Euros, and only 1,67% were employed for more than 1,000 Euros monthly. In fact, the projections for 2018 -the year when the

implementation of the Third Memorandum will have been concluded- are for 90% of Greek taxpayers (i.e. 7 out of 8 million workers and pensioners) to receive income of less than 1,000 Euros per month<sup>64</sup>.

This process of pauperization of the majority of the population finds its double in the process of wealth accumulation by very few. According to Credit Suisse, 1% of the world population owns 48% of global wealth, whereas in Greece 1% of the population owns 56,1% of the national wealth in 2014 (from 48,6% in 2007). One could safely argue then that not everyone was adversely affected by the economic crisis. The tendency of capital accumulation following the crisis is confirmed by Oxfam's latest report that income inequality has reached a new global extreme, exceeding even its predictions from the previous year. Just 62 individuals now hold the same wealth as the bottom half of humanity, compared with 80 in 2014 and 388 in 2010 (Oxfam, 2016).

The tendencies of pauperisation of the many and wealth accumulation by the few are two processes which result from the fundamental contradiction between Capital and Labour. Balancing on the dialectics of the abstract and the concrete, this thesis was carried out in the process of posing and re-posing of questions, such as: How does the above described economic and social reality relate to questions of sovereignty? Who holds absolute power and authority in Greece? How do measures that lead to pauperisation and wealth accumulation relate to popular sovereignty? How do they relate to the 'No' vote of July 5<sup>th</sup> 2015?

Under this prism, the thesis was an application of the internal-external analysis to the field of legal ideology and the public legal form. The foundational concepts of public law were examined in their role in a social formation. The concept of popular sovereignty, the idea of the social contract and the idea of the 'people', the concept of the general will, as well as democratic institutions, such as the referendum, were examined through the angle of totality. The dialectical materialist point of view holds that any discussion of law and the legal form remains one-sided unless the issue of social and economic processes is discussed.

Furthermore, the contradiction between Capital and Labour, which formed the background of the analysis, pointed towards another guiding intuition of this thesis: that the precise analysis and understanding of the bourgeois public legal form is a necessary precondition for contesting and

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<sup>64</sup> The data comes from the statistical analysis of periodic returns submitted by employers to the Greek National Insurance Institution (IKA) for December 2015 (Kathimerini, 2016), (Huffington Post, 2016). It is important to note in light of the analysis of uneven development that during the same period (2008-2015), unemployment in the EU rose from 6,7% to 9,6%, in France from 7,1% to 10,5%, whereas in Germany unemployment 7,8% to 4,7%.

possibly transcending it. As was pointed out in the fourth chapter, for Walter Benjamin the ‘emergency situation’ should be understood from the standpoint of the oppressed, in order to grasp the need to apply a ‘real state of emergency’. In the same manner, for the dialectical materialist analysis of the public legal form it is necessary to grasp the role of the state of exception, its unity with the rule of law, and its relation to class struggle; only then will we be able to question not only the exceptional form which infringes upon formal rights, but the validity of the capitalist property regime itself which thwarts the satisfaction of vital social needs.

For this a move from Political Theology to political economy in the critical analysis of public law is of the essence; and the initiation of this move has been the main purpose and modest contribution of the thesis. In this context, it is appropriate to conclude the thesis with a few remarks on the relationship between two *prima facie* contradictory concepts: democracy and dictatorship. The contradictory relation between democracy and dictatorship was another theme underlying the thesis, besides the contradiction between Capital and Labour. Chapter Three, drawing from the experience of the Greek referendum, examined how the most democratic form of expression of the popular will came to accompany yet another round of austerity-driven measures in Greek society.

In fact, in less than one calendar year, part of the political life of Europe revolved around two questions that were referred to the Greek and the British peoples. In this context it was discussed many a time what it means to fight for democracy against neoliberalism, or what it means to reduce the EU’s democratic deficit. But, what does it mean to fight for democracy? Is the fight for democracy an end in itself, or a means to other ends? What has it led to, when it is sought as an end in itself? How has it been recuperated by social forces which have an inherent interest in the reproduction of social division, inequality and exploitation?

Ultimately, what is the relationship between democracy and capitalism? In Chapter Two we saw the role played by the concept of the ‘people’ in the rise to power of the bourgeois class, as well as the function of the concept of popular sovereignty in the reproduction of the regime of capitalist power, property and productive relations. In Chapters Three, Four and Five we looked at specific manifestations of the popular will and constitutional processes in the context of capitalist crises in the 20<sup>th</sup> (mid-war Germany) and 21<sup>st</sup> century (Greek crisis legislation). With regards to the latest developments in the ‘impossible’ relationship between democracy and capitalism, it has been argued that the post-war settlement -when capitalism and democracy seemed to become aligned with one another, as economic progress made it possible for working-class majorities to accept a free-market, private-property regime- is today under challenge, and

doubts about the compatibility of a capitalist economy with a democratic polity have powerfully returned (Streeck, 2014).

Wolfgang Streeck's recent study on the four stages (inflation, private debt, public debt, and financial market deregulation) of democratic capitalism between 1945 and 2010 attests to the unsustainable nature of this politico-economic paradigm. At the basis of this development lies a distrust of elites in democratic government and its suitability for reshaping societies in line with market imperatives. Majoritarian decision-making cannot accommodate the Capital's counter-attack on the post-war settlement. In the same line of reasoning, economic crises are interpreted, by standard theories of 'public choice', as essentially stemming from market-distorting political interventions for social objective (Streeck, 2011).

This interpretation goes hand in hand with praise for authoritarian political systems, which are better equipped than majoritarian democracy to deal with challenges of globalisation. Of course this is not something entirely new. In Chapter Four we saw this tendency towards authoritarian forms of exercise of public power as expressed in Carl Schmitt's plea for a qualitative total state. A similar plea was advanced by Friedrich Hayek, who in his later years advocated abolishing democracy in defence of economic freedom and civil liberty<sup>65</sup>. Arguably, the main elements of current neo-institutionalist politico-economic theory are thoroughly Hayekian. According to this dominant position, to work properly, capitalism requires a rule-bound economic policy, with protection of markets and property rights constitutionally enshrined against discretionary political interference; independent regulatory authorities; central banks, firmly protected from electoral pressures; and international institutions, such as the European Commission or the European Court of Justice, that do not have to worry about popular re-election (Streeck, 2011).

Direct result of the above is the distantiation of the people from decision-making centres and the canalisation of the subsequent indignation, frustration, social movements and processes of radicalisation into system-logical, easily-containable dilemmas, celebrating the doctrine of 'there is no alternative'. In fact, a result of the pervasive sense among ordinary people that politics can no longer make a difference in their lives, is the declining electoral turnout combined with high voter volatility, producing ever greater electoral fragmentation, due to the rise of 'populist' protest parties, and pervasive government instability (Streeck, 2014). This deadlock between 'there is no alternative' and populism originates in the politico-economic impasse described by Streeck.

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<sup>65</sup> A study on the ambiguous relationship between Carl Schmitt and Friedrich Hayek can be found in (Cristi, 1998, pp. 146-168).

And this deadlock, precisely, as it appears in currently developing constitutional processes and forms of exercise of public power, necessitates the examination of political rule and power alongside economic power. The rule of the people, which democracy stands for, historically has been used to refer only to the *form of government* since the *actual rule* of the people as a whole has never materialised in historical class-divided societies. In democratic capitalist societies, the political power does not rest with the whole people; it rather rests with certain faction of it, i.e. with a certain class or class-alliance. In fact, as Streeck puts it, economic power seems today more than ever to have become political power, ‘while citizens appear to be almost entirely stripped of their democratic defences and their capacity to impress upon the political economy interests and demands that are incommensurable with those of capital owners’ (Streeck, 2011).

Consequently, the point raised in the thesis is that the concept of democracy and the people’s rule remains one-sided unless it involves the issue of actual rule and power (in both its political and economic aspects). The vital issue of who rules over the economy and how social agents relate to the forces of production cannot remain outside a holistic analysis of the democratic practices. Democracy can then be seen also as actual power and input of the popular strata over the organisation of a regime of power, property and productive relations. For this a methodological shift from one-sidedness to totality and an investigation of the Marxist concept of dictatorship is necessary; a concept which is analytically useful in analysing the relation between democracy and capitalism, as well as the constitutional processes in where development of this relation manifests itself.

Democracy and dictatorship seem *prima facie* antithetical, since the former signifies the rule of the people as a whole, whereas the latter stands in for the rule of the one. This is the formal reading of this relationship, which takes the two terms to both refer merely to different forms of government. However, as we saw in Chapter Four, democracy and dictatorship are not antithetical for Schmitt, who locates the main antithesis between liberalism and authoritarianism, and for whom democracy and authoritarian capitalism are perfectly compatible. To his concept of a dictatorial (authoritarian) democracy the Marxist concept of a democratic dictatorship is juxtaposed: ‘democratic’ as a form and ‘dictatorship’ as per property and productive relations. This enables a discussion of democracy in its relation to questions of social and economic power and the reposing of the question: democracy for whom?

To begin with, the formal notion of dictatorship is characterised by the element of lawlessness and unrestricted state power. In the fourth chapter we came across Schmitt’s definition of dictatorship as the exercise of state power freed from any legal restrictions, for the purpose of resolving an abnormal situation. The element of lawless power of the State is the essential

characteristic in Poulantzas's definition of dictatorship, too. 'The State often transgresses law-rules of its own making by acting without reference to the law, but also by acting directly against it' (Poulantzas, 2000, p. 84). On the contrary, for the dialectical concept of dictatorship the essential element is not violence, but class struggle. From a Marxist standpoint, *the essential factor* is not repression or repressive violence, but that the State rests *on a relation of forces between classes*, and *not on the public interest and the general will* (Balibar, 1977, p. 71).

The dialectical concept of class dictatorship is a many-sided concept which refers to the totality of socio-economic relations and juridico-political form. The terms 'dictatorship of the bourgeoisie' and 'dictatorship of the proletariat' are concepts which refer not only to the issue of form of government. Ownership of the means of production, the existence of the law of value or the existence of the law of balanced development of the economy, are the factors which determine the nature of a class dictatorship and which, because of their existence, reveal the nature of the class which expresses its class power as political power as well.

The dialectical concept of dictatorship refers to a process which emphasises on the developments taking place at the level of productive forces and productive relations. Seen under this prism, there is no incompatibility between democracy and class dictatorship. Their incompatibility is the result of the ideological struggle between bourgeois legal ideology and the dialectical materialist point of view. From a Marxist standpoint, democracy and dictatorship are compatible because they refer to different but united processes. In fact, it has been argued that the whole question of 'democracy' versus 'dictatorship' is profoundly rooted in legal ideology. Their opposition is presented by bourgeois legal formalism as a general and absolute opposition between two forms of government. Bourgeois legal ideology performs a clever conjuring trick in ceaselessly explaining that a democratic State cannot be a dictatorship, because it is a 'constitutional State' in which the source of power is popular sovereignty, in which the government expresses the 'general will' of the people (Balibar, 1977, p. 69). This thesis sought to challenge this position through a critical analysis of the legitimating fictions of popular sovereignty and general will, in Chapters Two and Three. Additionally, Chapters Four and Five were an attempt to move beyond the rigid opposition of norm and exception and see the unity of the rule of law and the state of exception.

Of course the dialectical concept of dictatorship has not gone unchallenged, even within the Marxist discourse. In fact, Nicos Poulantzas warned against a formalist use of Marxist principles which may lead to 'dogmatic banalities' such as: 'every State is a class State; all political domination is a species of class dictatorship; the capitalist State is a State of the bourgeoisie' (Poulantzas, 2000, p. 124). According to Poulantzas, such formalism is incapable of advancing

research by a single inch and is completely unserviceable in analysing concrete situations since it cannot account for the differential forms and historical transformations of the capitalist State (Poulantzas, 2000, p. 125).

Certainly, put thus, some of these statements may sound like banalities. We saw, for instance, in Chapters One, Four and Five that the bourgeoisie is not a homogenous metaphysical subject, but consists of different conflicting fractions -in that sense the statement 'the capitalist State is a State of the bourgeoisie' sounds like a banality. But this does not mean that the State mechanism of a social formation where the capitalist mode of production is predominant is not a class mechanism which consolidates the rule of the dominant class (or fractions of class, or class alliance) and ensures the reproduction of the capitalist relations of production.

On the contrary, the Marxist analysis of state and law based on the concept of class dictatorship is a concrete analysis of concrete situations. The concept of class dictatorship can account for the 'differential forms and historical transformations of the capitalist State' precisely because it conceives the legal and state form as corresponding to concrete historical situations, to different levels of intensification socio-economic contradictions, but always serving the material content of ensuring the reproduction of a regime of power, property and productive relations. The dialectical materialist concept of dictatorship does not reduce the liberal democratic form of government to the authoritarian one. It rather serves to understand the differences and the reasons behind the differences of the two forms by focusing on the totality, the unity of form and content. The concept of class dictatorship refers precisely to this unity, and not merely to the form of government as the formalist conception of dictatorship does. As was argued in Chapter Four, one has to understand why the Weimar Republic is a dictatorship of the bourgeoisie in order to understand the different form of the Nazi state; one has to understand why the welfare state is an instantiation of the dictatorship of the bourgeoisie to understand the different form of the neoliberal state. In this context the value of Marxist concepts as analytical categories manifests itself.

Democracy as actual rule of the people cannot exist as long as the primary purpose of legal and political institutions is to reproduce a regime of capitalist power, property and productive relations. Political power has never been separated from economic power. Therefore, any critical project of analysing or radical project of transcending bourgeois parliamentarism -not through the elimination of democratic representative institutions and electivity but through the conversion of the representative institutions from talking shops into 'working' institutions (Lenin, 2009, p. 42)- would have to take into account the issue of actual power and social and economic relations and processes.



Such a project does not begin or -much more- end in a doctoral thesis. But, this thesis was written with the deep conviction that the adoption of the dialectical materialist viewpoint and method, applied here in the analysis form of public law, is a necessary precondition for any such project. To start speaking not of the state in the abstract, but of the capitalist state; not of sovereignty in the abstract, but of the absolute-qua-sovereign economic and political power of a dominant class; not of decision in the abstract, but of decision based on socially and historically conditioned interests; not of the ever-present possibility of conflict, but of the ever-present possibility of suspending the rule of law, in order to deal with the internal enemy, the threat to the capitalist state: this is what initiates the move from Political Theology to political economy.

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